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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1914~~

No. ~~705~~, 454

JOHN A. S. BROWN AND FRANK E. SCHERMERHORN, AS TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED,

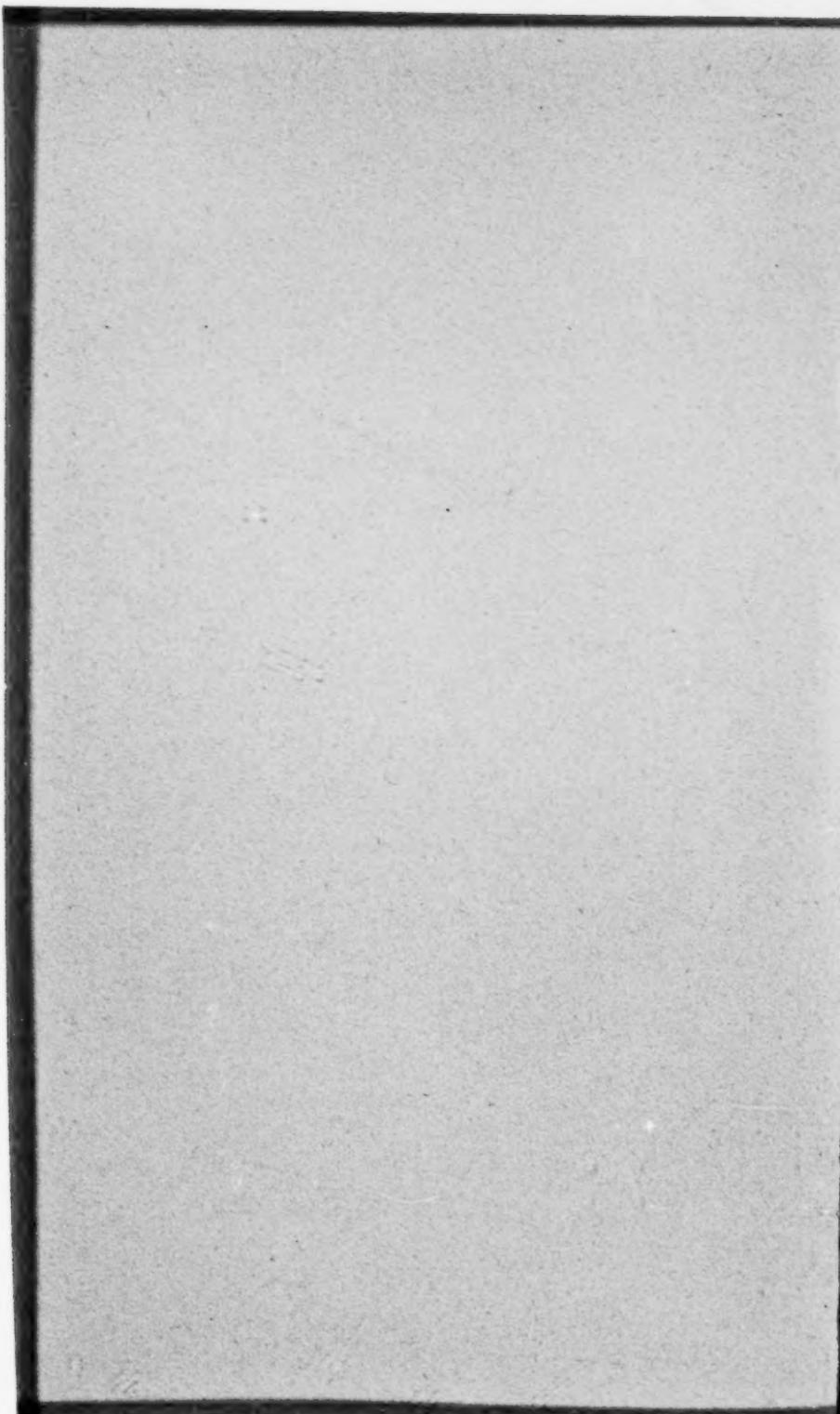
v.s.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED Apr 20, 1914.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. .

JOHN A. S. BROWN AND FRANK E. SCHERMERHORN, AS TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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BILL OF COMPLAINT.

(Filed February 25, 1913.)

IN THE

District Court of the United States,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

—
Eq. 10. No. 112.
—

JOHN A. S. BROWN, a citizen of the State of Pennsylvania, and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania,

versus

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and CONRAD MORRIS BRAKER, a citizen of the State of New York.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

JOHN A. S. BROWN, of the City of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania, and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, also of the City of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania, bring this

Bill of Complaint

their Bill of Complaint against AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and CONRAD MORRIS BRAKER, a citizen of the State of New York, and thereupon your Orators complain and say:

First.—That your Orator, JOHN A. S. BROWN, is a resident of the City of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania; and that your Orator, FRANK E. SCHERMERHORN, is Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and is a resident of the City of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania; that the respondent, AUSTIN B. FLETCHER, is Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and is a resident of the City of New York, State of New York, and a citizen of the said State of New York, and that the respondent, CONRAD MORRIS BRAKER, is a resident of the City of New York, State of New York, and a citizen of the said State of New York.

Second.—That the jurisdiction of this Court depends upon the diverse citizenship of the parties hereto, and the amount in controversy exceeds the sum of Three Thousand Dollars (\$3000).

Third.—That the aforementioned Conrad Braker, Jr., departed this life on the twenty-first day of July, 1890, having first made and published his Last Will and Testament in writing, bearing date the twentieth day of February, 1890, a copy of which is hereunto annexed, marked Exhibit "A" and made a part of this

Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth. That the said Conrad Braker, Jr., at the time of his decease, was a resident of the City, County and State of New York.

Fourth.—That on the thirteenth day of September, 1890, the said Will was duly admitted to probate by the Surrogate's Court of the County of New York, in the State of New York, and there recorded in Book of Wills, No. 435, at page 383 and following.

That thereupon letters testamentary were issued out of the said Court to Henry J. Braker and Frances J. Braker, as executor and executrix respectively of the said Last Will and Testament; and the said executor and executrix took upon themselves the duty of administering the estate of the said Conrad Braker, Jr., deceased, and received and collected the assets thereof.

Fifth.—That out of and from the assets of the said estate so received and collected as aforesaid, the said aforementioned executor and executrix paid over to Henry J. Braker the sum of Fifty Thousand Dollars (\$50,000) in trust for the special benefit of Conrad Morris Braker, the son of the aforesaid testator, Conrad Braker, Jr., such payment being made in accordance with the provisions of the "Fifteenth" paragraph of the aforementioned Will of the said testator, and to be held in trust by the said trustee as likewise provided for and directed by the said paragraph of the said Will.

Sixth.—That by an order and decree of the said Surrogate's Court of the County of New York, entered the sixteenth day of November, 1897, Austin B.

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Fletcher, defendant herein, was appointed as Testamentary Trustee for Conrad Morris Braker under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted trusts of which the said Henry J. Braker was trustee under the said Will, and then and there received, and now holds, said trust fund.

Seventh.—That under and by virtue of the aforementioned "Fifteenth" paragraph of the Last Will and Testament of the said Conrad Braker, Jr., deceased, the aforementioned Conrad Morris Braker became entitled to receive and to have paid to him the principal sum of Fifty Thousand Dollars (\$50,000) so held in trust for him as aforesaid, if and when he shall attain the age of fifty-five years.

Eighth.—That the said Conrad Morris Braker attained the age of fifty-five years on the twenty-fifth day of February, 1913, and he or his assigns then and there became entitled to receive and to have paid to him, or them, the principal sum of Fifty Thousand Dollars (\$50,000) so held in trust for him as aforesaid under the "Fifteenth" paragraph of the said Will.

Ninth.—That on the eighteenth day of April, 1901, and by a certain instrument in writing, bearing date of that day, the said Conrad Morris Braker sold and assigned to one Frank L. Rabe, seven-tenths of all the estate, right, title and interest of the said Conrad Morris Braker of, in and to the principal sum of Fifty Thousand Dollars (\$50,000), to which he, the said Conrad Morris Braker, was entitled under and by virtue of the "Fifteenth" clause of the Last Will and Testament of the said Conrad Braker, Jr., deceased. That

the said assignment was duly recorded in the Office of the Register of the County of New York, in Liber 4 of Miscellaneous Instruments, page 74, on the twenty-seventh day of April, 1901; and also further recorded in the Office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 195, on the twenty-first day of December, 1906. A copy of the said assignment is hereunto annexed, marked Exhibit "B" and is made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Tenth.—That on the first day of October, 1901, and by a certain instrument in writing, bearing date of that day, the said Frank L. Rabe, duly sold and assigned unto the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, all the estate, right, title and interest of the said Conrad Morris Braker under clause "Fifteen" in the Will of Conrad Braker, Jr., deceased. That the said assignment was duly recorded in the Office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 200, on the twenty-first day of December, 1906.

That a copy of the said assignment is hereunto annexed, marked Exhibit "C" and is made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

That thereafter, and in order to prevent any difficulty and misunderstanding as to the true intent and purpose of the said assignment from the said Frank L. Rabe to the New York Finance Company, dated the

first day of October, 1901, the said Frank L. Rabe on the fourth day of January, 1907, and by a certain instrument in writing, bearing date of that day, did further assure the interest and title so intended to be conveyed as aforesaid. That the said assignment was duly recorded in the Office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 236, on the fourteenth day of January, 1907.

That a copy of the said assignment is hereunto annexed, marked Exhibit "D" and made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Eleventh.—That on the nineteenth day of December, 1906, the said New York Finance Company did make and deliver unto John A. S. Brown, and unto Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, its certain promissory note bearing date also of that day, and providing for the payment of the certain sum of Ten Thousand Dollars (\$10,000) on the twenty-first day of July, 1910, together with interest thereon at the rate of six per cent. per annum; and as security for the payment of the said note did also make, execute and deliver unto the said John A. S. Brown, and unto the said Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, an assignment of the certain part of all the right, title and interest of the said New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit, a one-half part of the certain estate, right, title and interest, and any and

all moneys coming to the said New York Finance Company therefrom which had been heretofore sold and assigned by the said Frank L. Rabe to the said New York Finance Company by the aforementioned instrument, dated October 1, 1901, as by the said assignment bearing date the said nineteenth day of December, 1906, will more fully and at large appear. That the said assignment was duly recorded in the Office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 204, on the twenty-first day of December, 1906.

That a copy of the said note and also a copy of the said assignment are hereunto annexed, marked respectively Exhibit "E" and Exhibit "F" and are made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Twelfth.—That the said New York Finance Company defaulted in the promise particularly made and provided for in the aforementioned note, to wit, in the payment of the sum of Ten Thousand Dollars (\$10,000) therein provided for, and also in the payment of certain interest thereon for more than fifteen days after the same became due and payable.

Thirteenth.—That after such default in the payment of the aforementioned Note as aforesaid, your Orators, being the holders of the said Note, and under the power and authority given to them by the said Note and collateral assignment, did, on the Third day of May, 1911, cause the aforementioned collateral to the said Note to be sold at public sale, in the City of Philadelphia, State of Pennsylvania; and such sale thereof

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was made at such public sale to one Charles Z. Wolff for the sum of \$2,000, the said Charles Z. Wolff being the highest bidder, and that being the highest bid therefore.

Fourteenth.—That thereafter, and by a certain instrument in writing, bearing date the Sixth day of May, 1911, for the aforementioned consideration of Two Thousand Dollars (\$2,000) and also pursuant to such aforementioned sale thereof, your Orators did sell and assign unto the said Charles Z. Wolff all and every their, and each of their respective right, title and interest in and to the estate of Conrad Braker, Jr., deceased, so assigned to them as hereinbefore more particularly alleged and set forth. That the said assignment was duly recorded in the Office of the Surrogates of the County of New York, in Liber 10 of Conveyances and Mortgages of Interests in Decedents' Estates, page 27, on the Sixth day of June, 1911.

That a copy of the said assignment is hereunto annexed, marked Exhibit "G" and is made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Fifteenth.—That thereafter, and by a certain instrument in writing bearing date the Sixth day of May, 1911, the aforementioned Charles Z. Wolff duly sold and assigned to your Orators all and every the estate, right, title and interest of the said Charles Z. Wolff in and to the estate of Conrad Braker, Jr., deceased, so sold and assigned to him as hereinbefore more particularly alleged and set forth. That the said assignment was duly recorded in the Office of the Surrogates of the County of New York, in Liber 10 of Convey-

ances and Mortgages of Interests in Decedents' Estates, page 2, on the Sixth day of June, 1911.

That a copy of the said assignment is hereunto annexed, marked Exhibit "H" and is made a part of this Bill of Complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Sixteenth.—That by virtue of the several assignments hereinbefore particularly specified and set forth, your Orators became vested with and entitled to receive one-half of seven-tenths of the aforementioned sum of Fifty Thousand Dollars (\$50,000) otherwise payable to the said Conrad Morris Braker under the Fifteenth paragraph of the said Last Will and Testament of Conrad Braker, Jr., deceased, on the twenty-fifth day of February, 1913, as hereinbefore alleged and set forth.

Seventeenth.—Your orators further show that on the Twenty-fifth day of February, 1913, your Orators made demand at the office of the respondent, Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, upon William P. S. Melvin, his attorney, for the payment to your Orators of one-half of seven-tenths of the aforesaid legacy of Fifty Thousand Dollars (\$50,000) payable under the Fifteenth paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased. But your Orators further show that said William P. S. Melvin, attorney for the respondent, Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker as aforesaid then and there stated that Mr. Fletcher was out of the city, and did then and there neglect and re-

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fuse to pay to your Orators the said one-half of seven-tenths of the aforesaid legacy of Fifty Thousand Dollars (\$50,000) payable under the Fifteenth paragraph of the aforesaid Last Will and Testament of Conrad Braker, Jr., deceased; and your Orators further show that the said Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, has previously stated to Charles H. Burr, of counsel for your Orators, that he would not pay the said sum, or any part thereof without an Order of Court having jurisdiction of the controversy, and that the respondent Conrad Morris Braker had in writing directed and ordered the respondent, Austin B. Fletcher, as Testamentary Trustee as aforesaid, not to make payment to your Orators under and by virtue of the aforementioned assignments, or otherwise.

Eighteenth.—Your Orators further show that the assignment of the said Conrad Morris Braker to the said Frank L. Rabe, attached hereto as Exhibit "B" was and is an absolute sale of seven-tenths of the aforesaid legacy of Fifty Thousand Dollars (\$50,000), payable under the Fifteenth paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, and that by said assignment and the several mesne assignments hereinabove recited, an absolute title was and is vested in your Orators in and to the aforesaid one-half of seven-tenths of the aforesaid legacy of Fifty Thousand Dollars (\$50,000) payable under the Fifteenth paragraph of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased.

Nineteenth.—Your Orators further show that Conrad Morris Braker now pretends and alleges that

said assignment was in effect security for a usurious loan, and is therefore null and void. Your Orators are advised that the said Conrad Morris Braker is not a necessary party, but is a proper party defendant herein, and your Orators are further advised, allege, and aver, first, that the said assignment was in fact and in law an absolute sale; second, that the said Conrad Morris Braker is precluded by the Statute of Limitations of the State of New York from any and all attempt to set aside the said assignment because the said assignment and the transaction relating thereto was entered into and concluded on or about the Eighteenth day of April, 1901, a period of more than three years, and a period of more than ten years prior to this date, and that no action has ever been begun by the said Conrad Morris Braker to set aside, or have declared void, the aforesaid assignment. That any action by the said Conrad Morris Braker is therefore barred by the Third paragraph of Section Three Hundred and Eighty-three, and by Section Three Hundred and Eighty-eight of the Code of Civil Procedure of the State of New York.

Twentieth.—Your Orators are further advised that in accordance with the Constitution and Statutes of the United States they are entitled to have heard and determined by this Court their rights in and to the aforesaid legacy, free from any and all attempts and efforts which may, or shall be made by the respondents herein, or either of them, to evade the jurisdiction of this Honorable Court.

Wherefore your Orators need equitable relief, and pray:

(a) That your Orators may be declared entitled to the immediate possession of the said one-half of

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seven-tenths of the aforesaid legacy of Fifty Thousand Dollars (\$50,000) payable under the Fifteenth paragraph of the aforementioned last Will and Testament of Conrad Braker, Jr., deceased.

(b) That your Honorable Court may order and direct that Austin B. Fletcher, as Testamentary Trustee under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, shall be ordered and directed to pay to your Orators the said one-half seven-tenths of the legacy aforesaid, amounting to the sum of Seventeen Thousand Five Hundred Dollars (\$17,500).

(c) That your Honorable Court will order, adjudge and decree that the respondent herein, Conrad Morris Braker, has no title to, or right in, the aforementioned one-half of seven-tenths of the legacy aforesaid which he is entitled in any way to enforce against your Orators.

(d) That your Honorable Court will grant an injunction prohibiting and restraining the respondents herein, and each of them, from litigating, or attempting to litigate in any other Court the controversy and issues raised herein.

(e) That your Orators may have such further and general relief in the premises, as the nature of the case may require, and shall be agreeable to equity and good conscience.

(f) And your Orators further pray that your Honorable Court may issue a writ of subpoena to the defendants above-named, Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and Conrad Morris Braker, thereby command-

ing them, and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before your Honorable Court, and then and there full, true and perfect answer make, but not under oath, answer under oath being hereby expressly waived, to all and singular the premises, and further to stand to, perform and abide by such further order or direction or decree herein as to your Honorable Court may seem meet.

And your Orators will ever pray.

FREDRIC W. FROST,
*Solicitor for Complainants John A. S.
Brown and Frank E. Schermerhorn,
as Trustee.*

CHARLES H. BURR,
Of Counsel.

EXHIBIT "A."

In the Name of God, Amen.

I, Conrad Braker, Jr., of the City, County and State of New York, being of sound mind and memory and knowing the uncertainty of this mortal life, do make, publish and declare this to be my Last Will and Testament, hereby revoking and annulling all wills by me heretofore made, in manner and form following, that is to say:

First.—I direct that all my just debts and funeral expenses be paid as soon as convenient.

Second.—I give, devise and bequeath to my beloved wife, Frances J. Braker, the sum of One Hundred and twenty-five thousand dollars (\$125,000) and I direct

that the same shall be and belong to her absolutely and free from any restrictions of whatsoever nature, and I further direct that the same shall be paid to her within eighteen months after my decease, with interest at the rate of five (5) per centum per annum, payable quarterly upon the amount paid until the entire sum is paid.

It is my desire and I so direct that the above bequest shall have priority over any and all other bequests made in this my Last Will and Testament, and if not paid immediately upon my decease, I direct that such reasonable security as she may desire shall be given her for its payment within the time specified.

And I further give, devise and bequeath unto my said wife, all my furniture, pictures, plate, jewelry, ornaments, horses, carriages, wagons and harness, and I direct that the above provisions made for her shall be received in lieu of dower.

Third.—I give devise and bequeath to my son Henry J. Braker, his heirs and assigns, all my real and personal property of whatsoever nature or description situated in Hamilton Township, McKean County, State of Pennsylvania, consisting of Warrant No. 4912 and containing about ten hundred and fifty acres (1050); also my mill property at New Brooklyn, (now called South Plainfield) New Jersey. The same to be and belong to him absolutely and at his disposal.

And I further direct that should any of the property mentioned in this section be sold or otherwise disposed of previous to my death, that within twelve months after my decease my said son, Henry J. Braker, shall in its place receive the amount obtained for the same.

Fourth.—I give, devise and bequeath unto my son, Conrad Morris Braker, his heirs and assigns, my property in Nyack-on-the-Hudson, State of New York, the same being situated on Broadway in the said City and consisting of about two (2) acres of land; also my property in Township No. 41 Jefferson County, State of Missouri, consisting of about 120 (one hundred and twenty acres). Also my interest in about ninety-six acres of land, known as Disbrough Farm and situated in Millstone, Hilborough Township, Somerset County, New Jersey, my interest in the same being sixty-five per cent. (65%). Also my lot consisting of about two acres in New Brooklyn, New Jersey; the same being distinct and apart from the property in said New Brooklyn given to my son Henry J. Braker, the same to be and belong to him absolutely and at his disposal.

And I further direct that should any of the property mentioned in this section be sold or otherwise disposed of previous to my death, that within twelve months after my decease my said son, Conrad Morris Braker, shall in its place receive the amount obtained for the same.

Fifth.—I give, devise and bequeath unto my sister, Mrs. Louise Eekart, to have and to hold to her, her heirs, executors, administrators and assigns forever the sum of Twenty Thousand (\$20,000) Dollars, the same to be paid to her within two years after my decease with interest at the rate of Five (5) per centum, to be paid quarterly upon the amount remaining unpaid, until the entire sum is paid.

Sixth.—I give, devise and bequeath unto my brother, George Braker to have and to hold to him, his heirs, executors, administrators and assigns forever the sum of Twenty Thousand (\$20,000) Dollars, the

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same to be paid to him within two years after my decease, with interest at the rate of Five (5) per centum per annum, to be paid quarterly upon the amount remaining unpaid until the entire sum is paid.

Seventh.—I give, devise and bequeath unto my brother, John Henry Braker, to have and to hold to him, his heirs, executors, administrators, and assigns forever the sum of Fifteen Thousand (\$15,000) Dollars, and I direct that the same shall be paid to him within two years after my decease with interest payable quarterly upon the amount remaining unpaid at the rate of five (5) per centum per annum until the entire sum be paid.

Eighth.—I give, devise and bequeath to Mrs. Charles E. Morris, now of the City of Brooklyn, State of New York, the sum of One Thousand (\$1,000) Dollars, the same to be and belong to her, without restriction, and I direct that the said sum shall be paid to her within One Year from my decease.

Ninth.—I give, devise and bequeath to my friend, William D. Faris, now of the City of Brooklyn, State of New York, the sum of One Thousand (\$1,000) Dollars, the same to be and belong to him absolutely and without restriction, and I direct that the said sum be paid to him within One Year from my decease.

Tenth.—I give, devise and bequeath to William V. McKenzie, of Rahway, State of New Jersey, the sum of One Thousand (\$1,000) Dollars and direct that the same shall be paid to him within One Year from the date of my decease.

Eleventh.—After the above payments have been made as aforesaid and directed, I give, devise and be-

queath one-half of the rest, residue and remainder of my estate both real and personal, of whatsoever description and wheresoever situated to my son, Henry J. Braker, his heirs and assigns, the same to be and belong to him absolutely and without restriction.

Twelfth.—Out of the other one-half ($\frac{1}{2}$) of all the rest, residue and remainder of my estate, both real and personal wheresoever situated, I give and bequeath to my son, Conrad Morris Braker, the sum of Thirty Thousand Dollars (\$30,000), and I direct that of this sum, Five Thousand Dollars (\$5,000) shall be paid to him within sixty (60) days from the date of my decease, and the remaining Twenty-five Thousand Dollars (\$25,000) of the above Thirty Thousand Dollars (\$30,000), shall be paid to him within six months from the date of my decease, and until the above amounts are paid to him, I direct that he shall receive interest on the same at the rate of five (5) per centum per annum.

Thirteenth.—Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to William D. Faris the sum of Twenty Thousand Dollars (\$20,000) and I direct that the same shall be paid to him within nineteen months of the date of my decease, and that he shall hold the same in trust for the benefit of my grandchild, Florence May Braker, until she shall attain the age of twenty-one years, which will be May thirtieth, nineteen hundred and five (A. D. 1905) at which time I direct that the said sum together with any accrued and unpaid interest or increase shall be paid to her and be and belong to her absolutely. But I further direct that, if it shall appear necessary to the said trustee for the proper mainten-

ancee, support or education of my grand-child, the interest or increase derived from this bequest may be used for and applied to the above purposes, and her receipt notwithstanding her infancy, shall be an effectual discharge for the same but the principal shall remain intact until May thirtieth, nineteen hundred and five (A. D. 1905) if she shall live until that date. In the event of the death of my said grandchild, Florence May Braker, before she attains the age of twenty-one years, I direct that the principal and any accrued and unpaid interest or increase shall be paid to my son, Conrad Morris Braker, within six months of the date of her decease, if he be then living, if he shall not be living at the date of the death of my said grandchild, Florence May Braker, I direct that the said bequest shall revert to my residuary estate.

Fourteenth.—Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal wherever situated, I give and bequeath to Henry J. Braker the sum of Fifty Thousand Dollars (\$50,000), and I direct that the same shall be paid to him within nineteen months from the date of my decease, and that he shall hold the same IN TRUST and securely invested for the special benefit of my son, Conrad Morris Braker, and I direct that the interest or increase on the same or on such amount as shall be unpaid as hereinafter set forth, shall be paid to him quarterly so long as he shall live, but I further direct that if he be living at the expiration of ten years from the date of my decease that the said trustee shall pay to my son, said Conrad Morris Braker, the sum of Twenty Thousand Dollars (\$20,000) of said principal together with any accrued and unpaid interest should there be any, and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of fifteen years from the date of my decease, I direct that he shall be paid the further sum of Twenty Thousand Dollars (\$20,000), together with any accrued and unpaid interest on the said remaining Thirty Thousand Dollars (\$30,000) and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of twenty years from the date of my decease, I direct that the remaining Ten Thousand Dollars (\$10,000) of the above mentioned sum, together with any accrued and unpaid interest on the said remaining Ten Thousand Dollars (\$10,000) shall be paid to him and the same shall be and belong to him absolutely.

Fifteenth.—Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal wheresoever situated, I give and bequeath to my son Henry J. Braker, the further sum of Fifty Thousand Dollars (\$50,000), and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same in trust and securely invest it for the benefit of my said son, Conrad Morris Braker, paying him the interest derived from the same semi-annually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

In the event of the death of my said son, Conrad Morris Braker, before he attains the age of fifty-five years, I direct that the income derived from the said Fifty Thousand Dollars (\$50,000) shall be paid semi-annually to Florence L. Braker, wife of my said son, Conrad Morris Braker, so long as she shall live and

remains unmarried; in the event of her marriage or death, I direct that the said Fifty Thousand Dollars (\$50,000) shall be given to my grandchild, Florence May Braker if she then be living, and if she be not living then the said Fifty Thousand Dollars (\$50,000) shall be paid to my son Henry J. Braker if he be living, if he be dead, I direct that it sink into my residuary estate.

Sixteenth.—I direct that all that remains out of the above said “other one-half of all, the rest, residue and remainder, both real and personal, wheresoever situated,” after the bequests made in sections Twelfth, Thirteenth, Fourteenth and Fifteenth shall have been provided for, shall be held in trust by my wife, Frances J. Braker, and my son, Henry J. Braker, and their duly appointed successors, for the benefit of my said son, Conrad Morris Braker, until he shall attain the age of Fifty-five years, and I direct that the interest derived from said trust shall be paid to him semi-annually, and when he shall have attained the age of fifty-five years, I direct that the whole amount less the sum of Twenty-five thousand Dollars (\$25,000) shall be paid and belong to him absolutely.

Seventeenth.—I direct that if my son, Conrad Morris Braker, shall attain the age of fifty-four years that the trustees of the fund referred to in the above section shall purchase with the said twenty-five thousand dollars (\$25,000) an annuity for the benefit of my said son from such a Company as they shall deem best and safest.

Eighteenth.—I further direct in the event of the death of my said son, Conrad Morris Braker before he shall have received the bequests made to and for him,

and specified in sections Fourth, Twelfth, Fourteenth, Fifteenth and Sixteenth, then said bequests shall pass absolutely and at once to my son, Henry J. Braker, his executors and assigns, unless otherwise specified in said sections.

Nineteenth.—I further direct that the trustees of any of the above bequests may at any time sell any property or securities held by them and securely reinvest the proceeds as they shall deem best.

Twentieth.—I direct that any one who shall dispute or contest this my Last Will and Testament, shall forfeit one-half ($\frac{1}{2}$) of the legacies or benefits, they would otherwise receive under it, and the amount so forfeited shall revert to my residuary estate.

Twenty-first.—I nominate, constitute and appoint my son, Henry J. Braker, and my beloved wife, Frances J. Braker, the executor and executrix of this my Last Will and Testament, and I direct that the survivor shall be empowered to appoint a co-executor and in the event of either dying or failing to serve, it is my Will that another shall be appointed at once and that no one person shall serve alone as my executor or executrix, and I direct that neither my son, Henry J. Braker, or my beloved wife, Frances J. Braker, shall be required to give any bond or bonds for the execution of their duties.

Twenty-second.—I further direct that my son, Henry J. Braker, or my beloved wife, Frances J. Braker, in the event of the death of either shall individually be empowered to appoint a co-trustee, wherein they are named as such in this my last Will and Testament.

Bill of Complaint

IN WITNESS WHEREOF: I, the said Conrad Braker, Jr., have hereunto set my hand and seal this Twentieth day of February, One thousand eight hundred and ninety.

C. BRAKER, JR.

Signed, sealed, published and declared, by the said testator as and for his last Will and Testament, in the presence of us and each of us, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as attesting witnesses this Twentieth day of February, One thousand eight hundred and ninety.

AUSTIN L. FLETCHER,

Murray Hill Hotel, Park Ave., N. Y. City.

J. ARTHUR HARRATT,

645 Madison Ave., N. Y. City.

G. OLNEY BLOTT,

114 West 49th St., N. Y. City.

EXHIBIT "B."

WHEREAS, Conrad Braker, Jr., late of the City, County and State of New York, departed this life on or about the 21st day of July, A. D. 1890, having first made and published his Last Will and Testament in writing bearing date the twentieth day of February, A. D. 1890, duly proven and registered after his decease in the County of New York in the proper office therefor and recorded therein in Will Book No. 435, page 383, etc., wherein and whereby he did, inter alia, will as follows:

Fifteenth.—“Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to my son, Henry J. Braker, the further sum of Fifty Thousand Dollars (\$50,000) and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same IN TRUST and securely invest it for the benefit of my said son Conrad Morris Braker, paying him the interest derived from the same semi-annually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

“In the event of the death of my said son, Conrad Morris Braker before he attains the age of Fifty-five years, I direct that the income derived from the said Fifty Thousand Dollars (\$50,000) shall be paid semi-annually to Florence L. Braker, wife of my said son, Conrad Morris Braker so long as she shall live and remains unmarried. In the event of her marriage or death, I direct that the said Fifty Thousand Dollars (\$50,000) shall be given to my grandchild, Florence May Braker if she then be living and if she be not living, then the said Fifty Thousand Dollars shall be paid to my son Henry J. Braker if he should be living, if he be dead, I direct that it sink into my residuary estate.”

Sixteenth.—“I direct that all that remains out of the above said ‘other one-half of all the rest, residue and remainder, both real and personal wheresoever situated,’ after the bequests made in sections twelfth, thirteen, fourteen and fifteen shall have been provided for, shall be held IN TRUST by my wife, Frances J.

Bill of Complaint

Braker and my son Henry J. Braker, and their duly appointed successors for the benefit of my said son Conrad Morris Braker until he shall attain the age of Fifty-five years, and I direct that the interest derived from said Trust shall be paid to him semi-annually and when he shall have attained the age of fifty-five years, I direct that the whole amount less the sum of Twenty-five thousand Dollars shall be paid and belong to him absolutely."

WHEREAS, at a Surrogate's Court held in and for the County of New York on the Sixteenth day of November, A. D. 1897, and by virtue of an order and decree rendered by said Court, Austin B. Fletcher was appointed as Testamentary Trustee for the said Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted Trusts of which Henry J. Braker was Trustee, under the above recited Last Will and Testament.

WHEREAS, by a recent account rendered by the said Austin B. Fletcher of his proceedings as such Testamentary Trustee of the said Conrad Morris Braker to October 1st, 1900, and filed in the Surrogate's Court of the County of New York, it is shown that the Fifty Thousand Dollars (\$50,000) mentioned in Clause Fifteen of said Will has been duly invested as therein provided for, and that a sum aggregating One Hundred and Twenty Thousand, Seven Hundred and Thirty-one Dollars and Five Cents has been invested with the exception of a small portion thereof, for the use and benefit of the said Conrad Morris Braker as provided for in Clause Sixteen of said Will.

WHEREAS, the said Conrad Morris Braker is still living, and has attained the age of 43 years.

NOW KNOW ALL MEN BY THESE PRESENTS, that I, Conrad Morris Braker, of Stamford, Fairfield County, State of Connecticut (son of the above named testator, and devisee as hereinbefore recited) for and in consideration of the sum of One Dollar lawful money of the United States of America to me in hand well and truly paid at and before the sealing and delivery hereof by Frank L. Rabe, of the City of Philadelphia, and State of Pennsylvania, Attorney-at-Law, the receipt of all of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over and by these presents do grant, bargain, sell, assign, transfer and set over unto the said Frank L. Rabe, his heirs, executors, administrators and assigns seven-tenths of all my estate, right, title, and interest of, in and to the principal sum of \$50,000 to which I am entitled under and by virtue of the conditions of Clause Fifteen in the Last Will and Testament of the said Conrad Braker, Jr., deceased, as hereinbefore recited, and to no other part or portion of said estate whatever; so, however, and it is my intention, that the said Frank L. Rabe, his heirs, executors, administrators and assigns shall receive, by virtue of this assignment, the net sum of Thirty-five Thousand Dollars when and as soon hereafter as the same shall grow due and become payable, PROVIDED, HOWEVER, that should the said Trust Fund as created by the Fifteenth clause of said will, at any time hereafter be diminished by reason of any cause or thing whatsoever, whereby the said principal sum of \$50,000 should be reduced so that the assignee hereto, or his heirs, executors, administrators or assigns might not receive the said sum of Thirty-five Thousand Dollars, then, and in such case, I hereby assign, transfer and set over unto the said Frank L. Rabe, his heirs, execu-

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tors, administrators or assigns so much of all my estate, right, title and interest of, in and to that portion of the principal sum to which I am entitled under the conditions of clauses Fifteen and Sixteen in said Will, as may be necessary to make up any such deficiency, so, however, and I do by these presents, for myself, my heirs, executors, and administrators, covenant, grant and agree to and with the said Frank L. Rabe, his heirs, executors, administrators and assigns, that he, the said Frank L. Rabe, his heirs, executors, administrators and assigns shall and will as hereinbefore declared and set forth, receive the net sum of Thirty-five Thousand Dollars when and as soon as the said principal sum of \$50,000 shall become due and payable under and by virtue of the provisions and conditions set forth and declared in and by the Fifteenth clause of the said Last Will and Testament of the said Conrad Braker, Jr., deceased; to HAVE AND TO HOLD the same unto the said Frank L. Rabe, his heirs, executors, administrators and assigns from henceforth to and for his and their own proper use and benefit forever.

AND I DO HEREBY constitute and appoint the said Frank L. Rabe, my true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him and give and grant to him, his heirs, executors, or administrators, full power and authority in my name or in the name of my executors or administrators, to ask, demand, sue for, recover and receive the said right, title, interest, legacies, gifts and estate hereinbefore mentioned and particularly set forth, and to compound, acquit, release and discharge the same; I hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 18th day of April, A. D. 1901.

CONRAD MORRIS BRAKER. (L. S.)

(Stamp)

Sealed and delivered in
the presence of us:

CHARLES B. HELFFRICH,
JAMES P. J. MORRIS.

RECEIVED the day of the date of the foregoing Assignment and Power of Attorney of the within named Frank L. Rabe, the sum of One Dollar being the full consideration money within mentioned.

CONRAD MORRIS BRAKER.

Witnesses at signing:

CHARLES B. HELFFRICH,
JAMES P. J. MORRIS.

—

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, }
} ss.:

On the 18th day of April, A. D. 1901, before me the subscriber, personally came CONRAD MORRIS BRAKER, to me known and known to me to be the individual mentioned in and who executed the foregoing Assignment and Power of Attorney and acknowledged to me that he executed and delivered the same for the purposes therein set forth.

JAMES P. J. MORRIS,
Notary Public, N. Y. Co.

Recorded in the Office of the Register of the County of New York, in Liber 4 of Miscellaneous In-

Bill of Complaint

struments, page 74, on the 27th day of April, A. D., 1901, at 11 o'clock 42 min. A. M.

Witness my hand and official seal.

ISAAC FROMME,
Register. (Seal)

This certifies that the foregoing acknowledgment was recorded with the instrument of record in Liber 4, page 74.

ISAAC FROMME,
Register.

Recorded in the Office of the Surrogates' of the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 195, on the 21st day of Dec., A. D. 1906, at 3 o'clock 50 min. P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
Clerk of the Surrogates Court. (Seal)

EXHIBIT "C."

WHEREAS, Conrad Morris Braker by an Assignment and Power of Attorney, bearing date the Eighteenth day of April, A. D. 1901, and recorded in the Office of the Register of the County of New York in Liber 4 of Miscellaneous instruments, page 74, etc., did grant, bargain, sell, assign, transfer and set over seven-tenths of all his estate, right, title and interest of, in and to the principal sum of Fifty Thousand (\$50,000) Dollars to which he is entitled under and by virtue of the conditions of Clause "Fifteen" in the Last Will and Testament of Conrad Braker, Jr., de-

ceased, unto Frank L. Rabe, his heirs, executors, administrators and assigns forever.

AND WHEREAS, the said Conrad Morris Braker by an Assignment and Power of Attorney bearing date the Thirteenth day of June, A. D. 1901, and recorded in the office of the Register of the County of New York, in Liber No. 4 of Miscellaneous Instruments, page 125, etc., did grant, bargain, sell, assign, transfer and set over all his estate, right, title and interest of and to the principal sum of Fifty Thousand (\$50,000) Dollars, to which he is entitled under and by virtue of the "Fourteenth" Clause under the Will of the said Conrad Braker, Jr., deceased, unto Frank L. Rabe, his heirs, executors and administrators and assigns forever.

Now, KNOW ALL MEN BY THESE PRESENTS, that I, Frank L. Rabe, of the City of Philadelphia (Assignee as above recited) for and in consideration of the sum of Ten Thousand Dollars, lawful money of the United States of America, unto me in hand well and truly paid at and before the sealing and delivery hereof by the New York Finance Company, a corporation duly organized and existing under the laws of the State of New York, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said New York Finance Company, its successors and assigns, all my estate, right, title and interest of, in and to the interest of Conrad Morris Braker under Clause "Fifteen" in the Will of Conrad Braker, Jr., deceased, as well as all my right, title and interest of, in and to the interest of Conrad Morris Braker under Clause "Fourteen" in the will of the said Conrad Braker, Jr., deceased, and of all and every part or parcel thereof; TO HAVE AND TO HOLD unto the said New York

Finance Company, its successors and assigns from henceforth to and for their own proper use and benefit forever.

AND I DO HEREBY constitute and appoint the said New York Finance Company my true and lawful attorney, irrevocable with full power of substitution of other attorneys under them, and give and grant to them, their successors and assigns, full power and authority in my name or in the name of my executors and administrators to ask, demand, sue for, recover and receive the said right, title, interest, legacies, gifts and estate hereinbefore mentioned and set forth, and to compound, aequit, release and discharge the same, I hereby ratifying and confirming all and whatsoever they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this first day of October, A. D. 1901.

FRANK L. RABE. (Seal)

Sealed and delivered in
the presence of:

FRANCIS S. GINTHER,
GRACE R. RAU.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, }ss.:

On the Eleventh day of October, A. D. 1901, before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the within named Frank L. Rabe, and in due form of law acknowledged the above written assignment and Power of Attorney to

be his act and deed and desired the same might be recorded as such.

WITNESS my hand and Notarial Seal the day and year aforesaid.

FRANCIS S. GINTHER,
Notary Public.

(Seal)

Commission expires January 19, 1903.

Recorded in the Office of the Surrogates' of the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 200 on the 21st day of December, A. D. 1906, at 3 o'clock 56 min. P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court. (Seal)

Acknowledgment (Notary).

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.:

I, Thomas K. Finletter, Prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do by my deputy, James W. Fletcher, authorized by Act of Assembly of May 26th, 1897, certify that Francis S. Ginther, Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Pub-

lie for the Commonwealth of Pennsylvania residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said Instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court this 21st day of December, in the year of our Lord, One Thousand Nine Hundred and Six (1906).

THOMAS K. FINLETTER,
Prothonotary.

(Seal)

By JAS. W. FLETCHER,
*Dep. Prothonotary, durante absentia,
secundum legem.*

EXHIBIT "D."

WHEREAS, heretofore, and by a certain instrument in writing, bearing date the 18th day of April, 1901, one CONRAD MORRIS BRAKER, did assign and transfer unto one FRANK L. RABE, a seven-tenths part of the certain principal sum of \$50,000, to which the said Conrad Morris Braker was entitled under and by virtue of Clause Fifteen in the Last Will and Testament of one Conrad Braker, Jr., deceased, it being, however, fur-

ther provided by the said instrument, that should the fund created by the said Fifteenth Clause of the said Will, be by any cause or reason diminished or reduced below the said sum of \$50,000, so that the said Frank L. Rabe might not receive the net sum of \$35,000, intended to be assigned and transferred to him as aforesaid, that then and in that event, the said Conrad Morris Braker did assign and transfer unto the said Frank L. Rabe so much of the principal sum to which he, the said Conrad Morris Braker, was entitled under Clauses Fifteen and Sixteen in the aforementioned Will of Conrad Braker, Jr., deceased as might be necessary to make up any deficiency so that the said Frank L. Rabe should receive the aforementioned net sum of \$35,000; all of which by the aforementioned instrument more fully and at large appears; and,

WHEREAS, heretofore, and by a certain other instrument in writing, bearing date the 13th day of June, 1901, the aforesaid Conrad Morris Braker did also assign and transfer unto the aforesaid Frank L. Rabe, any and all his right, title and interest in and to the principal sum of \$50,000, to which the said Conrad Morris Braker was entitled under and by virtue of the "Fourteenth" Clause of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, subject only to the payment of the certain aggregate sum of \$13,000 therefrom, as by the aforementioned instrument will also more fully and at large appear; and,

WHEREAS, heretofore, and by a certain instrument in writing, bearing date the First day of October, 1901, the aforementioned Frank L. Rabe, did assign and transfer unto New York Finance Company, all and every his Estate, right, title and interest in and to the Estate of the aforementioned Conrad Braker, Jr., deceased, so assigned and transferred to him by Conrad

Morris Braker as hereinbefore recited and set forth; and,

WHEREAS, by inadvertence and mistake, the last mentioned assignment from Frank L. Rabe to New York Finance Company did not particularly refer to the right, title and interest acquired by the said Frank L. Rabe in and to the Estate of the aforesaid Conrad Braker, Jr., deceased, under the Sixteenth clause of his Last Will and Testament, and duly assigned to the said Frank L. Rabe by the aforesaid Conrad Morris Braker on April 18th, 1901, as hereinbefore particularly recited and set forth, although it was the intention of the parties thereto, that such interest was included in and was assigned by the said Frank L. Rabe to the said New York Finance Company, by the said instruments; and,

WHEREAS, to prevent difficulties and misunderstandings hereafter, it is expedient to correct such error and omission, if any there be:

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, the aforementioned Frank L. Rabe, for and in consideration of the premises, and also of the sum of One Dollar to me in hand duly paid, at and before the sealing and delivery of these presents, by the New York Finance Company, a corporation organized and existing under and by virtue of the Laws of the State of New York, and the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the said New York Finance Company, its successors and assigns FOREVER all and every my estate, right, title and interest of any kind, form, and description whatsoever, in and to the Estate of Conrad Braker, Jr., deceased, and particularly in and to

all moneys coming to me under the 14th, 15th and 16th Clauses of the Last Will and Testament of the said Conrad Braker, Jr., deceased, so assigned and transferred to me by Conrad Morris Braker, by the two certain instruments of assignment, dated respectively the 18th day of April, 1901, and June 12th, 1901, and hereinbefore more particularly referred to and set forth; TO HAVE AND TO HOLD the same unto the said New York Finanee Company, its successors and assigns to and for its and their own proper use and benefit forever; this instrument being given to correct any mistakes, omissions, or ambiguity, if any there be, in the aforementioned assignment between the said parties, dated October 1st, 1901.

AND I DO HEREBY constitute and appoint the said New York Finance Company my true and lawful Attorney irrevocable, with full power of substitution of other Attorneys under them, and give and grant to them, their Successors and Assigns, full power and authority in my name or in the name of my Executors and Administrators to ask, demand, sue for, recover and receive the said right, title, interest, legacies, gifts and estate hereinbefore mentioned and set forth, and to compound, aequit, release and discharge the same, I hereby ratifying and confirming all and whatsoever they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 4th day of January, A. D. 1907.

FRANK L. RABE (L. S.)

Sealed and delivered in

the presence of:

GEORGE KOPPENHOEFER, JR.,
M. McLAUGHLIN.

Bill of Complaint

On the 4th day of January, A. D. 1907, before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the within named Frank L. Rabe and in due form of law acknowledged the above written Assignment and Power of Attorney to be his Act and Deed and desired the same might be recorded as such.

WITNESS my hand and Notarial Seal, this day and year aforesaid.

GRACE C. FISHER,
(Seal) *Notary Public.*

Commission expires Jan. 18, 1907.

Recorded in the Office of the Surrogates' of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 236, on the 14th day of January, A. D. 1907, at Two o'clock 10 min. P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

Acknowledgment (Notary).
STATE OF PENNSYLVANIA, } ss.:
COUNTY OF PHILADELPHIA,

I, Thomas K. Finletter, Prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do by my deputy, James W. Fletcher, authorized by Act of Assembly of May 26th,

1897, certify that Grace C. Fisher, Esquire, whose name is subseribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said Instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court this 8th day of January, in the year of our Lord, One Thousand Nine Hundred and Seven (1907).

THOMAS K. FINLETTER,
Prothonotary.

By JAS. W. FLETCHER,
Dep. Prothonotary, durante absentia,
secundum legem.
(Seal)

Bill of Complaint**EXHIBIT "E."**

New York City, N. Y., Dec. 19, 1906.

On July 21st, 1910, for value received, the NEW YORK FINANCE COMPANY, promises to pay to the order of JOHN A. S. BROWN and of FRANK E. SCHERMERHORN as Trustee for Clara Schermerhorn under the Last Will and Testament of Thomas Cunningham, deceased, at No. 11 Broadway, Borough of Manhattan, City of New York, the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, having pledged herewith as collateral security (1) a certain part of all its right, title and interest in and to the estate of Conrad Braker, Jr., deceased, as by the certain assignment bearing even date herewith will more fully and at large appear, and (2) two certain Policies of Insurance of the Equitable Life Assurance Society of the United States, upon the life of one Conrad Morris Braker, also duly assigned of even date herewith.

And upon the non-performance of this promise, or upon default in the payment of any interest on the said loan for the space of fifteen days after the same shall become due and payable, it hereby authorizes and empowers the holder of this note to sell any and all of the certain part of all the right, title and interest of the said New York Finance Company in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is particularly described in the aforementioned assignment, at public or private sale at the option of the holders hereof, and with or without notice; and to apply the proceeds, or so much thereof, as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest,

holding the said New York Finance Company responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said New York Finance Company for the surplus, if any; with the privilege to the holder of this note to become the purchaser at such sale, if any be had.

NEW YORK FINANCE COMPANY.

By ARTHUR W. DEPUE,
President.

(Seal)

EXHIBIT "F."

WHEREAS, the New York Finance Company has this day made and given to John A. S. Brown and to Frank E. Schermerhorn as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, its certain promissory note for the payment of Ten Thousand (\$10,000) Dollars on the 21st day of July, 1910; and

WHEREAS, heretofore and by two certain instruments in writing bearing date of April 18th, 1901, and June 13th, 1901, respectively, one Conrad Morris Braker did grant, bargain, sell, assign, transfer and set over to one Frank L. Rabe certain of his estate, right, title and interest in and to the certain legacies coming to him under and by virtue of the "Fourteenth," "Fifteenth," and "Sixteenth" paragraphs respectively of the Last Will and Testament of Conrad Braker, Jr., deceased, as by the said assignments will more particularly and at large appear; and

WHEREAS, the said Frank L. Rabe by a certain instrument in writing bearing date of October 1st, 1901, did assign, transfer and set over to the aforementioned New York Finance Company any and all his aforementioned estate, right, title and interest in and to the es-

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tate of the said Conrad Braker, Jr., deceased, as hereinbefore more particularly recited, and as by the last mentioned assignment from the said Frank L. Rabe to the said New York Finance Company will also more fully and at large appear;

Now, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, for and in consideration of the sum of One Dollar to it in hand well and truly paid at and before the sealing and delivery hereof, by John A. S. Brown and by Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and the receipt whereof is hereby acknowledged, and for the purpose of securing to the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee aforesaid, payment of the aforesaid note, together with the interest thereon, has bargained, granted, sold, assigned, transferred and set over, and by these presents does hereby grant, bargain, sell, assign, transfer, and set over unto the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee for Clara Schermerhorn, under the Last Will of Thomas Cunningham, deceased, their and each of their executors, administrators, successors and assigns, any and all moneys coming to it under and by virtue of the aforementioned assignment bearing date of June 13th, 1901, and also a one-half part of any and all moneys coming to it under and by virtue of the aforementioned assignment bearing date of April 18th, 1901, and duly assigned to the said New York Finance Company as hereinbefore particularly recited and set forth, and also all and every its estate, right, title and interest in and to such moneys, or any part thereof; TO HAVE AND TO HOLD the same unto the said John A. S. Brown and

the said Frank E. Schermerhorn as Trustee aforesaid, their and each of their executors, administrators, successors and assigns to and for their and each of their own proper use and benefit forever; provided, however, that if the said New York Finance Company shall well and truly pay or cause to be paid unto the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee aforesaid, its certain note hereinbefore referred to, together with the interest thereon, or any note or notes which may be given in renewal thereof, then this assignment shall be null and void and the estate hereby created shall cease and determine.

And the said New York Finance Company does hereby appoint the said John A. S. Brown and Frank E. Schermerhorn its true and lawful attorneys, irrevocable, with full power of substitution of other attorneys under them and each of them, and give and grant to them and each of them, their and each of their executors, administrators, successors and assigns, full power and authority in its name, or in the name of its successors or assigns, to ask, demand, sue for, recover and receive the said right, title, interest, legacies and estate hereinbefore mentioned and particularly set forth, and to compound, acquit, release and discharge the same; it hereby ratifying and confirming all and whatever they or either of them shall lawfully do, or cause to be done in or about the premises.

IN WITNESS WHEREOF, the said New York Finance Company has hereunto signed its name, and caused the same to be signed by its President, and its corporate seal to be hereunto affixed, this 19th day of December, 1906.

NEW YORK FINANCE COMPANY.

ARTHUR W. DEPUE,
President.

(Seal)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On the 19th day of December, in the year One Thousand Nine Hundred and Six, before me personally came ARTHUR W. DEPUE, to me known, who being by me duly sworn, did depose and say: that he resides in the City of New York; that he is the President of the NEW YORK FINANCE COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

C. STANLEY MITCHELL,
Notary Public, N. Y. County, No. 193.

Recorded in the Office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 204, on the 21st day of December, A. D. 1906, at 3 o'clock 57 min. P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

EXHIBIT "G."

WHEREAS, heretofore, and on the 19th day of December, 1906, the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, did make and deliver unto John A. S. Brown, and to Frank E. Scher-

merhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, its certain promissory note, bearing date the said 19th day of December, 1906, and providing for the payment of the said sum of Ten Thousand Dollars (\$10,000) on the 21st day of July, 1910, together with interest thereon at the rate of 6% per annum, payable semi-annually, at No. 11 Broadway, Borough of Manhattan, City of New York, and as security for the payment of the said note did also make, execute and deliver unto the said John A. S. Brown, and unto Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, an assignment of the certain part of all the right, title, and interest of the New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to wit: a one-half part of the certain estate, right, title, and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company, by a certain instrument in writing, bearing date of October 1st, 1901; and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit: the certain estate, right, title, and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of June 13th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writ-

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ing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the said 19th day of December, 1906, will more fully and at large appear; and

WHEREAS, in and by the certain promissory note it is provided, inter alia, as follows, to wit:

"And upon the non-performance of this promise, or upon default in the payment of any interest on the said loan for the space of fifteen days after the same shall become due and payable, it hereby authorizes and empowers the holder of this note to sell any and all of the certain part of all the right, title and interest of the said New York Finance Company, in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is particularly described in the aforementioned assignment, at public or private sale at the option of the holders hereof; and with or without notice; and to apply the proceeds, or so much thereof, as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest, holding the said New York Finance Company responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said New York Finance Company for the surplus, if any: with the privilege to the holder of this note to become the purchaser at such sale, if any be had."

AND WHEREAS, the said New York Finance Company did default in said promise, to wit, in the payment of the said sum of \$10,000 and in the payment of certain interest due thereon for more than fifteen days after the same became due and payable, and after requests and demands for the payment thereof, failed, neglected and refused to make payment thereof; and

WHEREAS, the said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, being the holders of the said note, did on the 3rd day of May, 1911, cause the aforementioned collateral to the said note to be sold at Public Sale by Messrs. Barnes & Lofland, auctioneers, in the City of Philadelphia, State of Pennsylvania, freed and discharged from any equity of redemption, to Charles Z. Wolff for the sum of Two Thousand Dollars (\$2,000.00), the said Charles Z. Wolff being the highest bidder, and that being the highest bid therefor.

Now, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we, the aforementioned John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, for and in consideration of the aforementioned sum of Two Thousand Dollars (\$2,000.00), to us in hand paid, and the receipt whereof is hereby acknowledged, and also pursuant to such aforementioned sale, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the aforementioned Charles Z. Wolff, his executors, administrators and assigns, the certain part of all the right, title and interest of the New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to wit: a one-half of the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18th, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain in-

strument in writing, bearing the date of October 1st, 1901: and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit: the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of June 13th, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the said 19th day of December, 1906, will more fully and at large appear, freed and discharged from any equity of redemption.

To HAVE AND TO HOLD THE SAME, unto the said Charles Z. Wolff, his executors, administrators and assigns forever.

And the said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, hereby constitute and appoint the said Charles Z. Wolff their true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his successors and assigns, full power and authority in their name, to ask, demand, sue for, recover and receive the aforementioned interest in the estate of Conrad Braker, Jr., deceased, and any and all moneys payable thereunder as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and discharge the same, they hereby ratifying and confirming all and whatsoever he or they shall lawfully do or cause to be done in or about the premises.

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IN WITNESS WHEREOF, the said John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, have hereunto set their respective hands and seals this sixth day of May, A. D. 1911.

JOHN A. S. BROWN, (Seal)
FRANK E. SCHERMERHORN,
As trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased.

Signed, sealed and delivered
in the presence of:

(Seal)

GEORGE KOPPENHOEFER, JR.,
RAYMOND C. KARGE.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

On this Sixth day of May, A. D., 1911, before me, the subscriber, personally came and appeared JOHN A. S. BROWN, to me known, and known to me to be one of the persons described in and who executed the foregoing instrument, and in due form of law acknowledged to me that he executed the same as and for his voluntary act and deed.

WITNESS my hand and Notarial Seal, the day and year aforesaid.

GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

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STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, }ss.:

On this Sixth day of May, A. D., 1911, before me, the subscriber, personally came and appeared FRANK E. SCHERMERHORN, to me known, and known to me to be one of the persons described in and who executed the foregoing instrument, and in due form of law acknowledged to me that he executed the same as Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased.

WITNESS my hand and Notarial Seal, the day and year aforesaid.

GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, }ss.: Acknowledgment (Notary)

I, Henry F. Walton, Prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that George Koppenhoefer, Jr., Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs

of deeds or conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court this 6th day of May, in the year of our Lord, one thousand nine hundred and eleven (1911).

HENRY F. WALTON,
Prothonotary.

(Seal) Recorded in the Office of the Surrogates' of the County of New York in Liber 10 of Conveyances and Mortgages of Interests in Decedents' Estates, page 27 on the 6th day of June, A. D. 1911, at 12 o'clock 52 min. P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

EXHIBIT "H."

WHEREAS, heretofore, and on the 19th day of December, 1906, the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, did make and deliver unto John A. S. Brown, and to Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under

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the last Will and Testament of Thomas Cunningham, deceased, its certain promissory note, bearing date the said 19th day of December, 1906, and providing for the payment of the said sum of Ten Thousand Dollars (\$10,000) on the 21st day of July, 1910, together with interest thereon at the rate of 6% per annum, payable semi-annually, at No. 11 Broadway, Borough of Manhattan, City of New York; and as security for the payment of the said Note did also make, execute and deliver unto the said John A. S. Brown, and unto Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, an assignment of the certain part of all the right, title and interest of the New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to wit, a one-half part of the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901; and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit: the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of June 13th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing

the date of October 1st, 1901, as by the certain assignment bearing date the said 19th day of December, 1906, will more fully and at large appear; and

WHEREAS, in and by the certain promissory note it is provided, inter alia, as follows, to wit:

"And upon the non-performance of this promise, or upon default in the payment of any interest on the said loan for the space of fifteen days after the same shall become due and payable, it hereby authorizes and empowers the holder of this note to sell any and all of the certain part of all the right, title and interest of the said New York Finance Company, in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is particularly described in the aforementioned assignment, at public or private sale at the option of the holders hereof, and with or without notice; and to apply the proceeds, or so much thereof, as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest, holding the said New York Finance Company responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said New York Finance Company for the surplus, if any; with the privilege to the holder of this note to become the purchaser at such sale, if any be had."

AND WHEREAS, the said New York Finance Company did default in the said promise, to wit, in the payment of the said sum of \$10,000 and in the payment of certain interest due thereon for more than Fifteen days after the same became due and payable, and after requests and demands for the payment thereof, failed, neglected and refused to make payment thereof; and

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WHEREAS, the said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, being the holders of the said Note, did on the 3rd day of May, 1911, cause the aforementioned collateral to the said note to be sold at Public Sale by Messrs. Barnes & Lofland, auctioneers, in the City of Philadelphia, State of Pennsylvania, freed and discharged from any equity of redemption, to Charles Z. Wolff for the sum of Two Thousand Dollars (\$2,000.00), the said Charles Z. Wolff being the highest bidder, and that being the highest bid therefor; and

WHEREAS, the aforementioned John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, pursuant to such abovementioned sale, and in consideration of the aforementioned sum of Two Thousand Dollars (\$2,000.00), and on the Sixth day of May, A. D. 1911, did grant, bargain, sell, assign, transfer and set over unto the said Charles Z. Wolff, his executors, administrators and assigns, all and every the estate, right, title and interest of the said New York Finance Company, in and to the aforementioned estate of Conrad Braker, Jr., deceased, which estate, right, title and interest is hereinbefore more particularly described and set forth, freed and discharged from any equity of redemption.

Now, THEREFORE, know all men by these presents, that I, the aforementioned Charles Z. Wolff, of the City of Philadelphia, State of Pennsylvania, for and in consideration of the sum of Two Thousand Dollars (\$2,000.00), to me in hand paid, and the receipt whereof is hereby acknowledged, have granted, bar-

gained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, their and each of their respective executors, administrators, successors and assigns, all and every the estate, right, title and interest which I, the said Charles Z. Wolff now have, or hereafter may become entitled to receive, in, to or from the aforementioned estate of Conrad Braker, Jr., deceased, as hereinbefore more particularly mentioned and described, and also any and all moneys coming to me therefrom.

TO HAVE AND TO HOLD THE SAME, unto the said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, their, and each of their respective executors, administrators, successors and assigns forever.

And the said Charles Z. Wolff hereby constitutes and appoints the said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, his true and lawful attorneys, irrevocable, with full power of substitution of other attorneys under them and each of them, and give and grant to them, and each of them, their and each of their respective executors, administrators, successors, and assigns, full power and authority in his name, to ask, demand, sue for, recover and receive the aforementioned interest in the estate of Conrad Braker, Jr., deceased, and any and all moneys payable thereunder, as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and discharge the

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same, I hereby ratifying and confirming all and whatsoever they or either of them shall lawfully do, or cause to be done in or about the premises.

IN WITNESS WHEREOF, I, the aforementioned Charles Z. Wolff, have hereunto set my hand and seal, this Sixth day of May, A. D. 1911.

CHARLES Z. WOLFF. (Seal)

Signed, sealed and delivered
in the presence of:

GEORGE KOPPENHOEFER, Jr.,
RAYMOND C. KARGE.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } *ss.:*

On this Sixth day of May, A. D., 1911, before me, the subscriber, personally came and appeared CHARLES Z. WOLFF, to me known, and known to me to be the person described in and who executed the foregoing instrument, and in due form of law acknowledged to me that he executed the same as and for his voluntary act and deed.

WITNESS my hand and Notarial Seal, the day and year aforesaid.

GEORGE KOPPENHOEFER, Jr.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

Acknowledgment (Notary)

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } ss.:

I, Henry F. Walton, Prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that George Koppenhoefer, Jr., Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of deeds or conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere: and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court this 6th day of May, in the year of our Lord, one thousand nine hundred and eleven (1911).

HENRY F. WALTON,

Prothonotary.

(Seal)

56 Answer of Defendant Fletcher as Trustee

Recorded in the Office of the Surrogates' of the County of New York in Liber 10 of Conveyances and Mortgages of Interests in Decedents' Estates, page 2 on the 6th day of June, A. D. 1911, at 12 o'clock 52 min.
P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWNEY,
Clerk of the Surrogates' Court.

**ANSWER OF DEFENDANT FLETCHER AS
TRUSTEE.**

(Filed May 21, 1913.)

The above-named defendant, Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, separately and for himself answering the Bill of Complaint herein:

I. Admits the allegations contained in the paragraphs of said bill numbered "third," "fourth," "fifth," "sixth" and "seventh."

II. Admits as alleged in the "eighth" paragraph of said bill that Conrad Morris Braker attained the age of fifty-five years on the 25th day of February, 1913, and that he, or his assigns, became entitled to receive and have paid over to him or them the fund under the trust provided for him by the fifteenth paragraph of the will of Conrad Braker, Jr., but this admission is qualified by this that such payment is subject to, a prior accounting on the part of this defendant respecting said trust.

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III. Defendant further answering is without knowledge that the plaintiffs, John A. S. Brown or Frank E. Schermerhorn, are citizens of the State of Pennsylvania, and further, is without knowledge that the plaintiff, Frank E. Schermerhorn, is trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, as alleged in paragraph "first" of said bill.

IV. Defendant denies that the jurisdiction of the court depends upon the diverse citizenship of the parties, as alleged in paragraph "second" of the bill.

V. Defendant further answering is without knowledge that Conrad Morris Braker, as alleged in the "ninth" paragraph of the bill, sold and assigned to Frank L. Rabe, seven-tenths of his right, title and interest in the sum of \$50,000, under the fifteenth clause of said will of Conrad Braker, Jr. And is without knowledge that said alleged assignment was recorded, as alleged in the office of the Register of the County of New York, and also recorded in the Surrogates' office of the County of New York. And is further without knowledge that the alleged copy of said assignment (Exhibit B) is a true copy of said assignment.

VI. Defendant further answering is without knowledge that the New York Finance Company is a corporation, organized and existing under the laws of the State of New York, and is without knowledge that Frank L. Rabe sold and assigned to said Company, as alleged in the "tenth" paragraph of the bill, all the right, title and interest of said Conrad Morris Braker under the fifteenth clause of the said will of Conrad Braker, Jr.—and is without knowledge that said last mentioned assignment was recorded, as alleged, in the

56 Answer of Defendant Fletcher as Trustee

Recorded in the Office of the Surrogates' of the County of New York in Liber 10 of Conveyances and Mortgages of Interests in Decedents' Estates, page 2 on the 6th day of June, A. D. 1911, at 12 o'clock 52 min. P. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

**ANSWER OF DEFENDANT FLETCHER AS
TRUSTEE.**

(Filed May 21, 1913.)

The above-named defendant, Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, separately and for himself answering the Bill of Complaint herein:

I. Admits the allegations contained in the paragraphs of said bill numbered "third," "fourth," "fifth," "sixth" and "seventh."

II. Admits as alleged in the "eighth" paragraph of said bill that Conrad Morris Braker attained the age of fifty-five years on the 25th day of February, 1913, and that he, or his assigns, became entitled to receive and have paid over to him or them the fund under the trust provided for him by the fifteenth paragraph of the will of Conrad Braker, Jr., but this admission is qualified by this that such payment is subject to, a prior accounting on the part of this defendant respecting said trust.

III. Defendant further answering is without knowledge that the plaintiffs, John A. S. Brown or Frank E. Schermerhorn, are citizens of the State of Pennsylvania, and further, is without knowledge that the plaintiff, Frank E. Schermerhorn, is trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, as alleged in paragraph "first" of said bill.

IV. Defendant denies that the jurisdiction of the court depends upon the diverse citizenship of the parties, as alleged in paragraph "second" of the bill.

V. Defendant further answering is without knowledge that Conrad Morris Braker, as alleged in the "ninth" paragraph of the bill, sold and assigned to Frank L. Rabe, seven-tenths of his right, title and interest in the sum of \$50,000, under the fifteenth clause of said will of Conrad Braker, Jr. And is without knowledge that said alleged assignment was recorded, as alleged in the office of the Register of the County of New York, and also recorded in the Surrogates' office of the County of New York. And is further without knowledge that the alleged copy of said assignment (Exhibit B) is a true copy of said assignment.

VI. Defendant further answering is without knowledge that the New York Finance Company is a corporation, organized and existing under the laws of the State of New York, and is without knowledge that Frank L. Rabe sold and assigned to said Company, as alleged in the "tenth" paragraph of the bill, all the right, title and interest of said Conrad Morris Braker under the fifteenth clause of the said will of Conrad Braker, Jr.—and is without knowledge that said last mentioned assignment was recorded, as alleged, in the

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office of the Surrogate of the County of New York, or that the alleged copy thereof (Exhibit C) is a true copy of said assignment.

And defendant is without knowledge that Frank L. Rabe made another or additional assignment to said Company, as alleged in the "tenth" paragraph of the bill, or that said latter assignment was recorded, as alleged, in the office of the Surrogates of the County of New York, or that the alleged copy thereof (Exhibit D) is a true copy of said latter assignment.

VII. Defendant is without knowledge that the New York Finance Company, as alleged in the "eleventh" paragraph of the bill, did make and deliver to the plaintiffs the promissory note therein referred to; and is also without knowledge that said Company, as security for the payment of said note, made the assignment as alleged in said paragraph; and is without knowledge that such assignment was recorded at the time and in the place and manner as alleged, or that the alleged copy of said note and said assignment (Exhibits E and F) are true copies thereof.

VIII. This defendant is without knowledge that said Company defaulted in the payment of said note or the interest thereon, as alleged in the "twelfth" paragraph of said bill.

IX. Defendant further answering is without knowledge of the several allegations contained in the "thirteenth" paragraph of the bill.

X. Defendant further answering is without knowledge that the plaintiffs, as alleged in the "fourteenth" paragraph of the bill, did sell and assign to Charles Z. Wolff, their right, title and interest in the estate of Conrad Braker, Jr. And is without knowledge that this last assignment was recorded at the time, place

Answer of Defendant Fletcher as Trustee 59

and manner as alleged, or that the alleged copy thereof (Exhibit G) is in truth a copy thereof.

XI. And further answering this defendant is without knowledge that (as alleged in the "fifteenth" paragraph of the bill), Charles Z. Wolff sold to the plaintiffs the right, title and interest of said Wolff in the estate of Conrad Braker, Jr., and is without knowledge that the assignment just referred to was recorded at the time and in the place and manner, as alleged or that the alleged copy thereof (Exhibit H) is in truth a true copy thereof.

XII. And further answering this defendant is advised that the plaintiffs are not vested with nor entitled, as alleged, to one-half of the seven-tenths of the fund payable to Conrad Morris Braker, under the fifteenth paragraph of said will of Conrad Braker, Jr.

XIII. And further answering defendant is without knowledge that the plaintiff's made the demand alleged to have been made by them in the "seventeenth" paragraph of the bill. And defendant avers that William P. S. Melvin was not authorized to entertain such a demand nor was he empowered to pay or directed to refuse to pay said plaintiffs. Further he denies that he ever made the statement attributed by said paragraph of the bill to have been made by him to Charles H. Burr.

XIV. Defendant further avers that he has been advised that he need not answer the conclusions of law stated by plaintiffs in the "eighteenth," "nineteenth" and "twentieth" paragraphs of the bill.

XV. And for a second defence this defendant avers that upon the face of the bill this court has not cognizance of this suit.

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XVI. And for a third defence this defendant avers that upon the face of the bill it is insufficient of facts to constitute a valid cause of action.

XVII. And for a fourth defence this defendant avers that upon the face of the bill the plaintiffs have a plain, adequate and complete remedy at law.

XVIII. And for a fifth defence this defendant avers that it was provided by the statute law of the State of Pennsylvania, prevailing at the time of the making of the assignment referred to in paragraph numbered "tenth" of the bill of complaint with reference to foreign corporations (Purdon's Digest, Vol. 2, 13th ed. p. 1730), that no foreign corporation should do any business in Pennsylvania until it should have established an office or offices and appointed as an agent for the transaction of its business therein; that it should not be lawful for any such foreign corporation to do any business in said state until it should have filed in the office of the Secretary of the Commonwealth a statement under the seal of said corporation signed by its president or secretary showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein, and that the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement shall be preserved for public inspection by each of its agents in each and every of said offices. Further that any person or persons, agents, officers or employee of any such foreign corporation who should transact any business within the commonwealth for any such foreign corporation without compliance with said requirements should be guilty of a misdemeanor and subject to possible fine and imprisonment.

Answer of Defendant Fletcher as Trustee 61

That after the making of said statute law and during the year 1901, another supplementary law was passed by the General Assembly in the State of Pennsylvania, which supplementary law was also prevailing at the time of the making of the said assignment referred to in paragraph "tenth" of the bill of complaint. Which latter act or law was to the effect that whenever a foreign corporation not having complied with the said pre-existing requirements should have assigned bona fide any mortgage or contract to any citizen of the State of Pennsylvania, any such person being the assignee of such delinquent corporation, in the holding of any mortgage, obligation or contract, might enforce the same in the courts of said State, notwithstanding such delinquent assignor foreign corporation had failed to file the statement and obtain the certificate required by the act or statute, of which this latter act was supplement, but subject to the proviso, nevertheless, that the latter act should not apply to any assignment of any contract or mortgage unless such assignment should have been made ten or more years prior to the passage of this latter act, namely, ten or more years prior to May 11, 1901. This defendant further avers the New York Finance Company being a corporation created by and under the laws of the State of New York, and not established, organized or chartered under the laws of the State of Pennsylvania, contrary to said statutes did business at various times in the State of Pennsylvania, since July 1, 1901, without having first established therein an office or offices and appointed an agent for the transaction of its business therein, and, besides, that it did such business without having theretofore filed in the office of the Secretary of the Commonwealth of Pennsylvania a statement under the seal of said New York Finance Com-

pany signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein.

That among the acts of business so done by the New York Finance Company in the State of Pennsylvania and not in the State of New York was the assignment referred to and described in paragraph "tenth" of the bill of complaint, and the negotiations, engagements, conferences and contracts had in Pennsylvania leading up to said assignment.

WHEREFORE this defendant prays that the bill of complaint may be dismissed with costs in favor of this defendant.

WILLIAM P. S. MELVIN,
*Solicitor for Defendant, Austin
B. Fletcher,*
165 Broadway,
New York City, N. Y.

ANSWER OF DEFENDANT BRAKER.

(Filed May 21, 1913.)

The respondent, Conrad Morris Braker, in answer to the bill of complaint herein:

First.—Alleges that he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph marked "First" of the bill of complaint, except the allegation which the respondent admits, namely, that the respondent, Austin B. Fletcher, is testamentary trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and is a resident of the

City and State of New York and a citizen of the State of New York, and that the respondent, Conrad Morris Braker, is a resident of the City and State of New York and a citizen of the State of New York.

Second.—Denies the allegations contained in paragraph marked "Second" of the bill of complaint, except that the respondent admits that the amount in controversy exceeds the sum of Three Thousand dollars (\$3,000.00).

Third.—Admits the allegations contained in paragraph marked "Third" of the bill of complaint.

Fourth.—Admits the allegations contained in paragraph marked "Fourth" of the bill of complaint.

Fifth.—Admits the allegations contained in paragraph marked "Fifth" of the bill of complaint.

Sixth.—Admits the allegations contained in paragraph marked "Sixth" of the bill of complaint.

Seventh.—Admits the allegations contained in paragraph marked "Seventh" of the bill of complaint.

Eighth.—Admits the allegations contained in paragraph marked "Eighth" of the bill of complaint, except the respondent denies the allegation that respondent's assigns on the 25th day of February, 1913, then and there became entitled to receive and to have paid to them the principal sum of Fifty thousand dollars (\$50,000.00), held in trust for Conrad Morris Braker under the "Fifteenth" paragraph of the will of Conrad Braker, Jr., deceased.

Ninth.—Denies the allegations contained in paragraph marked "Ninth" of the bill of complaint.

Tenth.—Denies the allegations contained in paragraph marked "Tenth" of the bill of complaint.

Eleventh.—Denies the allegations contained in paragraph marked "Eleventh" of the bill of complaint.

Twelfth.—Denies the allegations contained in paragraph marked "Twelfth" of the bill of complaint.

Thirteenth.—Denies the allegations contained in paragraph marked "Thirteenth" of the bill of complaint.

Fourteenth.—Denies the allegations contained in paragraph marked "Fourteenth" of the bill of complaint.

Fifteenth.—Denies the allegations contained in paragraph marked "Fifteenth" of the bill of complaint.

Sixteenth.—Denies the allegations contained in paragraph marked "Sixteenth" of the bill of complaint.

Seventeenth.—Denies the allegations contained in paragraph marked "Seventeenth" of the bill of complaint.

Eighteenth.—Denies the allegations contained in paragraph marked "Eighteenth" of the bill of complaint.

Nineteenth.—Denies the allegations contained in paragraph marked "Nineteenth" of the bill of complaint, except respondent admits as alleged that Conrad Morris Braker now pretends and alleges that said assignment was in effect security for a usurious loan, and is therefore null and void, and that the said Conrad Morris Braker is a proper party defendant herein.

Twentieth.—Denies the allegations contained in paragraph marked "Twentieth" of the bill of complaint.

FOR A FIRST AND SEPARATE DEFENSE.

Twenty-first.—That on July 21st, 1890, Conrad Braker, Jr., the father of the respondent, died at the City of New York, N. Y., having first made and published his Last Will and Testament in writing, bearing date the 20th day of February, 1890, a correct copy of which is annexed to, and made a part of the bill of complaint herein, and marked "Exhibit A."

Twenty-second.—That the said will was duly admitted to probate on September 13th, 1890, by the Surrogates' Court of the County of New York, in the City of New York, and recorded on Page 383, in Book of Wills No. 435, and thereupon letters testamentary were issued out of said court to Henry J. Braker, as Executor, and Frances J. Braker, as Executrix, respectively, who thereupon entered upon the administration of the estate of the said Conrad Braker, Jr., deceased, and received and collected the assets thereof.

Twenty-third.—That under and pursuant to the provisions of the "Fifteenth" paragraph in said Last Will and Testament the sum of Fifty thousand dollars (\$50,000.00), was to be held in trust by Henry J. Braker, for the special benefit of the Respondent, Conrad Morris Braker, until he attained the age of fifty-five years, when the said sum of fifty thousand dollars (\$50,000.00) was to be paid to him and belong to him absolutely.

Twenty-fourth.—That out of and from the assets of the said estate so received and collected as aforesaid, the aforementioned Executor and Executrix paid over to Henry J. Braker the said sum of Fifty thousand dollars (\$50,000.00), in trust for the special benefit of the respondent, Conrad Morris Braker, such payment

being made in accordance with the provisions of the said "Fifteenth" paragraph of the said will, and to be held in trust by the said Trustee, as likewise provided for and directed by the said paragraph of the said will.

Twenty-fifth.—That by an order and decree of the said Surrogates' Court of the County of New York, entered November 16th, 1897, respondent, Austin B. Fletcher, herein was appointed as Testamentary Trustee for Conrad Morris Braker under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted trusts of which the said Henry J. Braker was Trustee under the said will, and then and there received and now holds the said trust fund of Fifty thousand dollars (\$50,000.00) under and pursuant to the provisions of the "Fifteenth" paragraph of the said will, of which the respondent, Conrad Morris Braker, is the beneficiary as aforesaid.

Twenty-sixth.—That the respondent, Conrad Morris Braker, attained the age of fifty-five years on the 25th day of February, 1913, and he then became entitled to receive and have paid to him the said sum of Fifty thousand dollars (\$50,000.00), which has been held in trust for him as aforesaid under the "Fifteenth" paragraph of the said will.

Twenty-seventh.—That on or about the 18th day of April, 1901, at the City of New York, in the State of New York, the respondent, Conrad Morris Braker, being at that time a resident of Stamford, in the State of Connecticut, borrowed from Charles H. Burr, Arthur W. Depue and associates, of the City of Philadelphia, Pa., and the said Charles H. Burr, Arthur W. Depue and associates loaned to the said respondent

the sum of Three thousand five hundred dollars (\$3,500.00), for a period of about twelve (12) years from the date of said loan, namely, April 18th, 1901, to February 25th, 1913, upon which latter date the said loan was to be repaid; that it was then and there agreed between the respondent, Conrad Morris Braker and the said Charles H. Burr, Arthur W. Depue and associates that the latter should receive from the former as a consideration for the said loan for said space of time, in addition to the return of the principal of said loan, the sum of Thirty-one thousand five hundred dollars (\$31,500.00), payable at the maturity of said loan.

Twenty-eighth.—That the interest upon said loan of three thousand five hundred dollars (\$3,500.00), for said period of about twelve years at Six per cent. (6%) per annum, the highest amount allowed by law to be paid for the loan or forbearance of money, amounts to about Two thousand five hundred dollars (\$2,500.00), and no more.

Twenty-ninth.—That said agreement for said loan and the payment of said interest was made by the said Charles H. Burr, Arthur W. Depue and associates for the purpose on their part of receiving and taking a greater sum for the loan of said Three thousand five hundred dollars (\$3,500.00) than at the rate of Six per cent. (6%) per annum.

Thirtieth.—That as a cloak, cover and device to hide and conceal the said excessive illegal and usurious rate of interest from the respondent, Conrad Morris Braker, and agreed to be paid by him to the said Charles H. Burr, Arthur W. Depue and associates, the latter, in consideration of the making of said loan, at

the City of New York, N. Y., on or about April 18th, 1901, took a certain instrument in writing, bearing date April 18th, 1901, alleged to be an assignment from Conrad Morris Braker, to one Frank L. Rabe, which purported to sell and assign to said Rabe, "Seven-tenths of all the estate, right, title and interest of the said Conrad Morris Braker of, in and to the principal sum of Fifty thousand dollars (\$50,000.00)," to which the said Conrad Morris Braker was entitled by virtue of the "Fifteenth" paragraph of the said last will and testament of Conrad Braker, Jr., deceased, a copy of which said alleged assignment is annexed to the bill of complaint herein, made a part thereof and marked "Exhibit B."

Thirty-first.—That said Frank L. Rabe was at the date of said assignment and throughout the year 1901 a young man employed as a clerk in the office of the said Arthur W. Depue, in Philadelphia, who acted as a tool or dummy for Charles H. Burr, Arthur W. Depue and associates in the transactions and documents connected with the making of said loan by them to the respondent, Conrad Morris Braker; that the money for said loan was advanced and furnished by said Charles H. Burr, Arthur W. Depue and associates, and no part of it was provided by said Frank L. Rabe, who acted merely as a dummy in the transaction, the alleged assignment, dated April 18th, 1901, aforesaid, being taken in his name for convenience at the suggestion of Charles H. Burr, Arthur W. Depue and associates and being held by him for a brief period during the year 1901, until the New York Finance Company was organized as hereinafter described.

Thirty-second.—That on or about the 14th day of August, 1901, a corporation was organized under the

laws of the State of New York, by Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates, under the name of the New York Finance Company, for the purpose of purchasing any and all kinds of real and personal property and the loaning of money thereon; that the certificate of incorporation of said New York Finance Company was filed September 30th, 1901, in the office of the Clerk of the County of New York.

Thirty-third.—That the said Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates commenced the business of loaning money on personal property on or about October 1st, 1901, under the name of the New York Finance Company and for a few years thereafter conducted a business of loaning money on personal property under the name of the New York Finance Company, and used said corporate name merely as a cover and cloak for their personal transactions.

Thirty-fourth.—On information and belief that as a part of said plan and scheme and as a cover or cloak for said usurious transaction, the said Frank L. Rabe on or about October 1st, 1901, without consideration passing to him, executed a paper purporting to be an assignment by him to the said New York Finance Company, which was dated October 1st, 1901, and a copy of which said alleged assignment is annexed to the bill of complaint herein, made a part thereof and marked "Exhibit C," in and by which he attempted to sell or assign unto the New York Finance Co. inter alia all the estate, right, title and interest of the said Conrad Morris Braker under Clause "Fifteenth" of the will of Conrad Braker, Jr., deceased; that said alleged assignment from Rabe to the New York Finance Com-

pany was received by the New York Finance Company with full knowledge of the character of the transaction between the respondent Conrad Morris Braker and said Frank L. Rabe, and that the said Frank L. Rabe did not pay any consideration therefor to said respondent, and that the money loaned was loaned not by Frank L. Rabe but by Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates; that the New York Finance Company was not a bona fide or innocent purchaser from said Frank L. Rabe and did not give or pay a valuable consideration to the said Frank L. Rabe for the alleged assignment from the said Frank L. Rabe to the New York Finance Company.

Thirty-fifth.—That said contract and agreement of the respondent, Conrad Morris Braker, with the said Charles H. Burr, Arthur W. Depue and their associates, pursuant to which said loan of Three thousand five hundred dollars (\$3,500.00) was made, and the said instrument in writing, dated April 18th, 1901, alleged to be an assignment from Conrad Morris Braker to Frank L. Rabe is and are usurious and void, being in violation of Chap. 20 of the Consolidated Laws of the State of New York.

Thirty-sixth.—That by reason of the premises the said Charles H. Burr, Arthur W. Depue, William H. Cochran, Frank L. Rabe and associates and the New York Finance Company acquired no interest in the said legaey bequeathed to the respondent, Conrad Morris Braker by and under the "Fifteenth" paragraph of the said will of his said father, or in the fund held under said paragraph of said will by the respondent, Austin B. Fletcher, as Trustee, in trust for Conrad Morris Braker as aforesaid or any part thereof.

Thirty-seventh.—On information and belief, that on or about December 19th, 1906, without the knowledge of the respondents, the said New York Finance Company executed an instrument in writing, purporting to assign and transfer to the complainants inter alia all its right, title and interest of any kind, form or description, which the said New York Finance Company had in the "Fifteenth" paragraph of the said last will and testament of Conrad Braker, Jr., deceased, by virtue of the aforesaid alleged assignment made by the said Conrad Morris Braker to the said Frank L. Rabe, bearing date April 18th, 1901, and attached to the bill of complaint as "Exhibit B," as alleged collateral security for the payment on the 21st day of July, 1910, of a note for Ten thousand dollars (\$10,000.00), alleged to have been given by the said New York Finance Company to the complainants, together with interest at the rate of Six per cent. (6%) per annum and any note or notes which might be given in renewal thereof.

Thirty-eighth.—On information and belief, that the complainants for some time prior to December 19th, 1906, had had business relations with Charles H. Burr and his associates, and those active in the management of the New York Finance Company, were familiar with the character of the business transacted by it and by Charles H. Burr, Arthur W. Depue and their associates in the name of the New York Finance Company, and the character of the security offered as collateral to the said loan alleged to have been made by the complainants to the New York Finance Company.

Thirty-ninth.—On information and belief, that the complainants were not bona fide or innocent purchasers from the New York Finance Company, and did not loan the said Ten thousand dollars (\$10,000.00)

to the said New York Finance Company, or give or pay a valuable consideration for the alleged assignment from the New York Finance Company to them.

Fortieth.—On information and belief, that on or about December 19th, 1906, without the knowledge of the respondent, the New York Finance Company in consideration of the extension by the complainants of the time for the payment of said note of Ten thousand dollars (\$10,000.00) until February 15th, 1913, signed and delivered to the complainants a note for Three thousand three hundred and thirty-three dollars (\$3,333.00), payable on February 15th, 1913, and as security for the payment of said note, the New York Finance Company executed and delivered to the complainants an alleged assignment dated December 19th, 1906, which purported to assign and transfer to the complainants the said one-half part of any and all monies coming to the New York Finance Company by virtue of the aforementioned alleged assignments from Conrad Morris Braker to Frank L. Rabe, dated April 18th, 1901.

Forty-first.—On information and belief, that on or about the 3rd day of May, 1911, the complainants herein went through a form of selling at public auction the interest received by them under the alleged assignment from the New York Finance Company to the complainants, dated December 19th, 1906, by selling the same to one Charles E. Wolff, who was a mere dummy or straw man selected for the purpose; that thereafter alleged assignments dated May 6, 1911, were executed and delivered by the complainants to the said Charles E. Wolff, and from the said Charles E. Wolff back to the complainants; that the alleged sale was a sham and the alleged assignments were without con-

sideration, and the whole transaction was carried through for the apparent purpose of foreclosing the equity of redemption which was thought then to reside in the New York Finance Company, and upon the ground that the New York Finance Company had failed to pay its note of Ten thousand dollars (\$10,000.00) signed and delivered to the complainants as aforesaid; that at the time of said alleged sale and the said assignments of May 6th, 1911, the said note of Ten thousand dollars (\$10,000.00), given by the New York Finance Company to the complainants was not yet due, the time for the payment of the same having been extended to February 15th, 1913, as hereinbefore described; that the said assignments from the complainants to Charles E. Wolff and from Charles E. Wolff to the complainants were without consideration and void, and conferred no title upon complainants, and that the complainants were not bona fide or innocent purchasers without notice of the character of the proceeding assignments.

Forty-second.—That before the 25th day of February, 1913, the respondent, Conrad Morris Braker, elected to avoid said contract and agreement of loan between him and Charles H. Burr, Arthur W. Depue and associates, and said alleged assignment made by him to Frank L. Rabe on April 18th, 1901, on the ground of usury, and notified the respondent, Austin B. Fletcher, as Trustee, that the respondent, Conrad Morris Braker, objected to the payment to the complainants herein of any part of said trust fund, held by the said Trustees under the "Fifteenth" paragraph of the will of Conrad Braker, Jr., deceased, on account of and by reason of any alleged assignments from the respondent, Conrad Morris Braker, to Frank L. Rabe,

and from Frank L. Rabe to the New York Finance Company, or from the New York Finance Company to the complainants herein.

Forty-third.—That if the alleged assignments from the respondent, Conrad Morris Braker, to the said Frank L. Rabe, dated April 18th, 1901, and the alleged assignment from the said Frank L. Rabe to the New York Finance Company, dated October 1st, 1901, and the alleged assignment from the New York Finance Company to the complainants herein, dated December 19th, 1906, are declared void, the respondent, Conrad Morris Braker will be entitled to the sum of Thirty-five thousand dollars (\$35,000.00) as a part of the legacy bequeathed to him in, under and by the "Fifteenth" paragraph of the will of Conrad Braker, Jr., deceased, free from any lien or claim of the complainants herein.

Forty-fourth.—That the respondent, Conrad Morris Braker, was on April 18th, 1901, a non-resident of the State of New York, having his residence then at Stamford, in the State of Connecticut, and did not become a resident of the State of New York until about the year 1908, and, on information and belief, that on April 18th, 1901, the said Frank L. Rabe was, and at all times since then, has been a non-resident of the State of New York, and on April 18th, 1901, and has since, resided in the City of Philadelphia, in the State of Pennsylvania.

FOR A SECOND AND SEPARATE DEFENSE.

Forty-fifth.—The respondent, Conrad Morris Braker, repeats the allegations contained in the preceding paragraphs of this answer numbered 21st,

22nd, 23rd, 24th, 25th and 26th, and makes the same a part of his second defense.

Forty-sixth.—That on or about the eighteenth day of April, 1901, at the City of New York, in the State of New York, the respondent, Conrad Morris Braker, being at that time a resident of Stamford, in the State of Connecticut, borrowed from Charles H. Burr, Arthur W. Depue and associates, of the City of Philadelphia, Pa., and the said Charles H. Burr, Arthur W. Depue and associates, loaned to the said respondent the sum of Three thousand five hundred dollars (\$3,500.00) for a period of about twelve (12) years from the date of said loan, namely April 18th, 1901, to February 25th, 1913, upon which latter date the said loan was to be repaid with the interest accumulated thereon at the rate of Six per cent. (6%) per annum.

Forty-seventh.—That the paper dated April 18th, 1901, executed and delivered by Conrad Morris Braker to Frank L. Rabe, a copy of which is annexed to the bill of complaint and marked "Exhibit B," although absolute on its face and in form and purporting to sell, assign and transfer to Frank L. Rabe seven-tenths of all the estate, right, title and interest of the said Conrad Morris Braker, of, in and to the principal sum of Fifty thousand dollars (\$50,000.00), to which he was entitled in and by virtue of the "Fifteenth" clause of the will of Conrad Braker, Jr., deceased, was in truth and in fact, and was intended to be, security for the payment of said loan of Three thousand five hundred dollars (\$3,500.00) as aforesaid.

Forty-eighth.—That at the time of the making of said loan of Three thousand five hundred dollars (\$3,500.00) to the respondent, Conrad Morris Braker,

the said Charles H. Burr, Arthur W. Depue and associates required him to execute said assignment to said Frank L. Rabe, as security for the repayment of said loan and interest on February 25th, 1913, and on or about April 18th, 1901, the respondent, Conrad Morris Braker, executed and delivered a paper which was represented to him by said Charles H. Burr, Arthur W. Depue and their associates to be in the nature of a security for the repayment of said loan; that the said Frank L. Rabe was at that time, namely, April 18th, 1901, and throughout the year 1901, a young man employed as a clerk in the office of the said Arthur W. Depue, in Philadelphia, and acted as a tool or dummy for Charles H. Burr, Arthur W. Depue and associates in the transactions and documents connected with the making of said loan by them to the respondent, Conrad Morris Braker; that the money for said loan was advanced and furnished by said Charles H. Burr, Arthur W. Depue and associates, and no part of it was provided by said Frank L. Rabe, who acted merely as a dummy in the transaction, the alleged assignment dated April 18th, 1901, aforesaid, being taken in his name for convenience and as a part of the fraudulent scheme hereinafter described at the suggestion of Charles H. Burr, Arthur W. Depue and associates, and being held by said Rabe for a brief period during the year 1901, until the New York Finance Company was organized; that the respondent, Conrad Morris Braker, did not read said paper alleged to be an assignment to Frank L. Rabe, and dated April 18th, 1901, but the same either was not read to him or if read to him it was read to him by Charles H. Burr, or Arthur W. Depue or William H. Cochran, and in the reading of it the fact that it was on its face and in form an absolute sale and assignment was suppressed, or the import of said paper, signed by

the respondent, Conrad Morris Braker, and its legal effect were not explained to him; that the said respondent is not a lawyer, and was not acquainted with or familiar with instruments of the character of this paper or the legal effect thereof, and was not at the time of the signing of the said paper represented by a lawyer; that when the negotiations connected with the making of said loan of Three Thousand Five Hundred Dollars (\$3,500.00) took place, the said respondent was dealing with Charles H. Burr, Arthur W. Depue and William H. Cochran, all of whom were lawyers, and the said respondent relied upon the statements and representations made by them before and at the time he signed said alleged assignment to said Rabe, and supposed and believed, and it was represented to him by the said Charles H. Burr, Arthur W. Depue and William H. Cochran and their associates, that the paper so signed by him was merely a security for the payment of said loan of Three Thousand Five Hundred Dollars (\$3,500.00); that the said respondent did not learn of the real form and character and legal effect of the said alleged assignment to Frank L. Rabe, dated April 18th, 1901, until shortly before he became fifty-five years of age, namely, February 25th, 1913; that the said respondent had previously, before this transaction, borrowed from two other persons, giving as security assignments of a legacy coming to him under the will of Conrad Braker, Jr., deceased, on the 21st day of July, 1905, and the said respondent supposed and believed and was induced by the representations and statements of the said Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates to suppose and believe, that the paper signed by him on April 18th, 1901, alleged to be an assignment to Frank L. Rabe, was of the same nature and form and of the

same legal effect as those he had signed in connection with the two previous loans.

Forty-ninth.—That the execution and delivery of the alleged assignment dated April 18th, 1901, described in paragraph "Ninth" of the bill of complaint, a copy of which is thereto annexed as "Exhibit B," by the respondent, Conrad Morris Braker, to the said Frank L. Rabe, was induced by and made upon the faith of certain statements, explanations and representations made to him by Charles H. Burr, Arthur W. Depue, William H. Cochran and associates, which said statements, explanations and representations the respondent has since learned were wholly false and fraudulent, and were known by the said Charles H. Burr, Arthur W. Depue, William H. Cochran and associates at the time they were made to have been false and fraudulent; that said statements, explanations and representations consisted of statements made to the said respondent that the said paper which he was induced to sign was in form and in effect merely security for the payment of said loan, and of the same general character as the papers previously signed by him in connection with two previous loans made to him by other parties, and that it was necessary for him to sign said paper in the form aforesaid in order to secure said loan, all of which statements, explanations and representations were wholly false and fraudulent, as the said respondent has since learned.

That said respondent, Conrad Morris Braker, wholly relying upon the truth of said statements, explanations and representations of the said Charles H. Burr, Arthur W. Depue, William H. Cochran and associates, and believing the same to be true, executed and delivered said alleged assignment dated April 18th, 1901.

Fiftieth.—That the said statements, explanations and representations and each of them made as aforesaid to said respondent by the said Charles H. Burr, Arthur W. Depue, William H. Cochran and associates were false and fraudulent, and were known to be false and fraudulent by the said Charles H. Burr, Arthur W. Depue, William H. Cochran and associates at the time they were made; that they were made for the purpose of inducing the execution by the said respondent of the alleged assignment to said Frank L. Rabe, dated April 18th, 1901, and that said alleged assignment was executed and delivered upon the faith of said statements, explanations and representations.

Fifty-first.—That all of the said acts of the said Charles H. Burr, Arthur W. Depue, William H. Cochran and associates were part of a plan to cheat and defraud the said respondent, Conrad Morris Braker, of his inheritance to the extent of Thirty-five Thousand Dollars (\$35,000.00), and to obtain it for their own use, purposes and control, and to deprive said respondent of his right, title and interest therein for the unconscionable small sum of Three Thousand Five Hundred Dollars (\$3,500.00).

Fifty-second.—That by reason of the premises, the said Frank L. Rabe, Charles H. Burr, Arthur W. Depue, William H. Cochran and associates acquired no interest in the said legacy bequeathed to the respondent, Conrad Morris Braker, by and under the provision of the "Fifteenth" paragraph of the will of his father, or in the funds held under said paragraph in said will by the respondent, Austin B. Fletcher, as Trustee, in trust for Conrad Morris Braker, as aforesaid, or any part thereof.

Fifty-third.—That said Frank L. Rabe was at the date of said assignment and throughout the year 1901 a young man employed as a clerk in the office of the said Arthur W. Depue, in Philadelphia, who acted as a tool or dummy for Charles H. Burr, Arthur W. Depue and associates in the transactions and documents connected with the making of said loan by them to the respondent, Conrad Morris Braker; that the money for said loan was advanced and furnished by said Charles H. Burr, Arthur W. Depue and associates, and no part of it was provided by said Frank L. Rabe, who acted merely as a dummy in the transaction, the alleged assignment, dated April 18th, 1901, aforesaid, being taken in his name for convenience at the suggestion of Charles H. Burr, Arthur W. Depue and associates, and being held by him for a brief period during the year 1901, until the New York Finance Company was organized as hereinafter described.

Fifty-fourth.—That on or about the 14th day of August, 1901, a corporation was organized under the laws of the State of New York, by Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates, under the name of the New York Finance Company, for the purpose of purchasing any and all kinds of real and personal property and the loaning of money thereon; that the certificate of incorporation of said New York Finance Company was filed September 30th, 1901, in the office of the Clerk of the County of New York.

Fifty-fifth.—That the said Charles H. Burr, Arthur W. Depue, William H. Cochran and their associates commenced the business of loaning money on personal property on or about October 1st, 1901, under the name of the New York Finance Company, and for a

few years thereafter conducted a business of loaning money on personal property under the name of the New York Finance Company, and used said corporate name merely as a cover and cloak for their personal transactions.

Fifty-sixth.—On information and belief, that as a part of said plan and scheme and as a cover or cloak for said transaction, the said Frank L. Rabe, on or about October 1st, 1901, without consideration passing to him, executed a paper purporting to be an assignment by him to the said New York Finance Company, which was dated October 1st, 1901, and a copy of which said alleged assignment is annexed to the bill of complaint herein, made a part thereof and marked "Exhibit C," in and by which he attempted to sell or assign unto the New York Finance Company, inter alia, all the estate, right, title and interest of the said Conrad Morris Braker under clause "Fifteenth" of the will of Conrad Braker, Jr., deceased; that said alleged assignment from Rabe to the New York Finance Company was received by the New York Finance Company with full knowledge of the character of the transaction between the respondent, Conrad Morris Braker, and said Frank L. Rabe, and that the said Frank L. Rabe did not pay any consideration therefor to said respondent, and that the money loaned was loaned, not by Frank L. Rabe, but by Charles H. Burr, Arthur W. Depue, William H. Coehran and their associates; that the New York Finance Company was not a bona fide or innocent purchaser from said Frank L. Rabe, and did not give or pay a valuable consideration to the said Frank L. Rabe for the alleged assignment from the said Frank L. Rabe to the New York Finance Company.

Fifty-seventh.—That by reason of the premises the said Charles H. Burr, Arthur W. Depue, William H. Cochran, Frank L. Rabe and associates and the New York Finance Company acquired no interest in the said legacy bequeathed to the respondent, Conrad Morris Braker, by and under the "Fifteenth" paragraph of the said will of his said father, or in the fund held under said paragraph of said will by the respondent, Austin B. Fletcher, as Trustee, in trust for Conrad Morris Braker, as aforesaid, or any part thereof.

Fifty-eighth.—On information and belief, that on or about December 19th, 1906, without the knowledge of the respondents, the said New York Finance Company executed an instrument in writing, purporting to assign and transfer to the complainants, inter alia, all its right, title and interest of any kind, form or description which the said New York Finance Company had in the "Fifteenth" paragraph of the said last will and testament of Conrad Braker, Jr., deceased, by virtue of the aforesaid alleged assignment made by the said Conrad Morris Braker to the said Frank L. Rabe, bearing date April 18th, 1901, and attached to the bill of complaint as "Exhibit B," as alleged collateral security for the payment on the 21st day of July, 1910, of a note for ten thousand dollars (\$10,000.00), alleged to have been given by the said New York Finance Company to the complainants, together with interest at the rate of six per cent. (6%) per annum and any note or notes which might be given in renewal thereof.

Fifty-ninth.—On information and belief, that the complainants for some time prior to December 19th, 1906, had had business relations with Charles H. Burr and his associates and with those active in the manage-

ment of the New York Finance Company, were familiar with the character of the business transacted by it and by Charles H. Burr, Arthur W. Depue and their associates in the name of the New York Finance Company, and the character of the security offered as collateral to the said loan alleged to have been made by the complainants to the New York Finance Company.

Sixtieth.—On information and belief, that the complainants were not bona fide or innocent purchasers from the New York Finance Company and did not loan the said ten thousand dollars (\$10,000.00) to the said New York Finance Company, or give or pay a valuable consideration for the alleged assignment from the New York Finance Company to them.

Sixty-first.—On information and belief, that on or about December 19th, 1906, without the knowledge of the respondent, the New York Finance Company, in consideration of the extension by the complainants of the time for the payment of said note of ten thousand dollars (\$10,000.00) until February 15th, 1913, signed and delivered to the complainants a note for three thousand three hundred and thirty-three dollars (\$3,333.00), payable on February 15th, 1913, and as security for the payment of said note, the New York Finance Company executed and delivered to the complainants an alleged assignment dated December 19th, 1906, which purported to assign and transfer to the complainants the said one-half part of any and all moneys coming to the New York Finance Company by virtue of the aforementioned alleged assignment from Conrad Morris Braker to Frank L. Rabe, dated April 18th, 1901.

Sixty-second.—On information and belief, that on or about the 3rd day of May, 1911, the complainants

herein went through a form of selling at public auction the interests received by them under the alleged assignment from the New York Finance Company to the complainants, dated December 19th, 1906, by selling the same to one Charles E. Wolff, who was a mere dummy or straw man selected for the purpose; that thereafter alleged assignments dated May 6th, 1911, were executed and delivered by the complainants to the said Charles E. Wolff, and from the said Charles E. Wolff back to the complainants; that the alleged sale was a sham and the alleged assignments were without consideration, and the whole transaction was carried through for the apparent purpose of foreclosing the equity of redemption which was thought then to reside in the New York Finance Company, and upon the ground that the New York Finance Company had failed to pay its note of ten thousand dollars (\$10,000.00), signed and delivered to the complainants as aforesaid; that at the time of said alleged sale and the said assignments of May 6th, 1911, the said note of ten thousand dollars (\$10,000.00), given by the New York Finance Company to the complainants was not yet due, the time for the payment of the same having been extended to February 15th, 1913, as hereinbefore described; that the said assignments from the complainants to Charles E. Wolff and from Charles E. Wolff to the complainants were without consideration and void, and conferred no title upon complainants, and that the complainants were not bona fide or innocent purchasers without notice of the character of the preceding assignments.

Sixty-third.—That before the 25th day of February, 1913, the respondent, Conrad Morris Braker, elected to avoid said contract and agreement of loan

between him and Charles H. Burr, Arthur W. Depue and associates, and said alleged assignment made by him to Frank L. Rabe on April 18th, 1901, on the ground of fraud, and notified the respondent, Austin B. Fletcher, as Trustee, that the respondent, Conrad Morris Braker, objected to the payment to the complainants herein of any part of said trust fund, held by the said Trustee under the "Fifteenth" paragraph of the will of Conrad Braker, Jr., deceased, on account of and by reason of any alleged assignments from the respondent, Conrad Morris Braker, to Frank L. Rabe, and from Frank L. Rabe to the New York Finance Company, or from the New York Finance Company to the complainants herein.

Sixty-fourth.—That if the alleged assignments from the respondent, Conrad Morris Braker, to the said Frank L. Rabe, dated April 18th, 1901, and the alleged assignment from the said Frank L. Rabe to the New York Finance Company, dated October 1st, 1901, and the alleged assignment from the New York Finance Company to the complainants herein, dated December 19th, 1906, are declared void, the respondent, Conrad Morris Braker, will be entitled to the sum of Thirty-five Thousand Dollars (\$35,000.00) as a part of the legacy bequeathed to him in, under and by the "Fifteenth" paragraph of the will of Conrad Braker, Jr., deceased, free from any lien or claim of the complainants herein.

Sixty-fifth.—That the respondent, Conrad Morris Braker, hereby tenders and offers to pay to the complainants herein, or to the person or persons whom this Honorable Court shall adjudge to be entitled to receive the same, the amount of said loan, namely, three thousand five hundred dollars (\$3,500.00), re-

ceived by him at the time of the signing of said paper dated April 18th, 1901, alleged to be an assignment to the New York Finance Company, with legal interest thereon from April 18th, 1901, to be computed by this Court, and hereby tenders and offers to pay, and upon the trial of this action will ask leave of this Court to tender and pay to the complainants in this action, or such person or persons as this Court may determine are entitled to receive the same, a part of said sum loaned, with interest, which shall bear the same ratio to the whole sum loaned, namely, three thousand five hundred dollars (\$3,500.00), as the amount claimed by the complainants, namely, seventeen thousand five hundred dollars (\$17,500.00), bears to the total amount of the said legacy, namely, thirty-five thousand dollars (\$35,000.00), alleged to have been assigned by Conrad Morris Braker to the said Frank L. Rabe, by said alleged assignment dated April 18th, 1901, or, in other words, a sum equivalent to one-half of the amount of said loan of three thousand five hundred dollars (\$3,500.00), and interest.

That this action was commenced on February 25th, 1902, the day said loan of three thousand five hundred dollars (\$3,500.00) became due and payable, and for this reason and because the complainants and Frank L. Rabe, Charles H. Burr, Arthur W. Depue, William H. Cochran and associates are non-residents, and the New York Finance Company has long since ceased to maintain an office within the State of New York, the respondent could not sooner make the tender and offer aforesaid.

Sixty-sixth.—That the respondent, Conrad Morris Braker, was on April 18th, 1901, a non-resident of the State of New York, having his residence then at Stam-

ford, in the State of Connecticut, and did not become a resident of the State of New York until about the year 1908, and, on information and belief, that on April 18th, 1901, the said Frank L. Rabe was, and at all times since then, has been a non-resident of the State of New York, and on April 18th, 1901, and has since, resided in the City of Philadelphia, in the State of Pennsylvania.

FOR A THIRD AND SEPARATE DEFENSE.

Sixty-seventh.—That the alleged assignment from the New York Finance Company to the complainants, dated December 19th, 1906, and the alleged assignment from the complainants to Charles E. Wolff, dated May 6th, 1911, and the alleged assignment from Charles E. Wolff to the complainants, dated May 6th, 1911, copies of which are annexed to the bill of complaint herein and marked respectively Exhibits "F," "G" and "H," were not executed, acknowledged and certified according to law, and there was no valuable or adequate consideration for said alleged assignments.

FOR A FOURTH AND SEPARATE DEFENSE.

Sixty-eighth.—The respondent, Conrad Morris Braker, alleges that it was provided by the statute law of the State of Pennsylvania, prevailing at the time of the making of the assignment referred to in paragraph numbered "tenth" of the bill of complaint with reference to foreign corporations (Purdon's Digest, Vol. 2, 13th Ed., p. 1730), that no foreign corporation should do any business in Pennsylvania until it should have established an office or offices and appointed an agent for the transaction of its business therein; that it should not be lawful for any such foreign corporation to do any business in said State until

it should have filed in the office of the Secretary of the Commonwealth a statement under the seal of said corporation signed by its president or secretary, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein, and that the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement shall be preserved for public inspection by each of its agents in each and every of said offices. Further that any person or persons, agents, officers or employee of any such foreign corporation who should transact any business within the Commonwealth for any such foreign corporation without compliance with said requirements should be guilty of a misdemeanor and subject to possible fine and imprisonment.

That after the making of said statute law and during the year 1901, another supplementary law was passed by the General Assembly in the State of Pennsylvania, which supplementary law was also prevailing at the time of the making of the said assignment referred to in paragraph "tenth" of the bill of complaint; which latter act or law was to the effect that whenever a foreign corporation not having complied with the said pre-existing requirements should have assigned bona fide any mortgage or contract to any citizen of the State of Pennsylvania, any such person being the assignee of such delinquent corporation, in the holding of any mortgage, obligation or contract, might enforce the same in the courts of said State, notwithstanding such delinquent assignor foreign corporation had failed to file the statement and obtain the certificate required by the act or statute, of which this latter act was a supplement, but subject to the pro-

viso, nevertheless, that the latter act should not apply to any assignment of any contract or mortgage unless such assignment should have been made ten or more years prior to the passage of this latter act, namely, ten or more years prior to May 11th, 1901. This defendant further avers that the New York Finance Company, being a corporation created by and under the laws of the State of New York, and not established, organized or chartered under the laws of the State of Pennsylvania, contrary to said statutes did business at various times in the State of Pennsylvania, since July 1st, 1901, without having first established therein an office or offices and appointed an agent for the transaction of its business therein, and, besides, that it did such business without having theretofore filed in the office of the Secretary of the Commonwealth of Pennsylvania a statement under the seal of said New York Finance Company, signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names of its authorized agent or agents therein.

That among the acts of business so done by the New York Finance Company in the State of Pennsylvania and not in the State of New York was the assignment referred to and described in paragraph "tenth" of the bill of complaint, and the negotiations, engagements, conferencees and conference, had in Pennsylvania leading up to said assignment.

FOR A FIFTH AND SEPARATE DEFENSE.

Sixty-ninth.—That the United States District Court for the Southern District of New York has no jurisdiction of the parties to this action or of the subject-matter thereof.

FOR A SIXTH AND SEPARATE DEFENSE.

Seventieth.—On information and belief, that Frank L. Rabe, of Philadelphia, Pa., New York Finance Company and Charles E. Bushnell, of New York City, N. Y., have or claim to have an interest in the estate of Conrad Braker, Jr., deceased, under the alleged assignment, dated April 18th, 1901, from Conrad Morris Braker to the said Frank L. Rabe, and they are, therefore, necessary parties to this action.

FOR A SEVENTH AND SEPARATE DEFENSE.

Seventy-first.—That the bill of complaint herein on its face does not state sufficient facts to constitute a valid cause of action in equity.

Wherefore, the respondent, Conrad Morris Braker, demands judgment,

(1) That said loan of three thousand five hundred dollars (\$3,500.00) was made as the result of a usurious or fraudulent contract, and that the same be adjudged and decreed null and void;

(2) That said alleged assignments from Conrad Morris Braker to Frank L. Rabe, from Frank L. Rabe to the New York Finance Company, from the New York Finance Company to the complainants, from the complainants to Charles E. Wolff and from Charles E. Wolff to the complainants, be adjudged and decreed to be illegal and null and void, and be ordered to be delivered up and cancelled.

Or, in case this Honorable Court shall refuse to render judgment as heretofore prayed for, then in that event the respondent, Conrad Morris Braker, demands judgment as follows:

(3) That said alleged assignments from Conrad Morris Braker to Frank L. Rabe, dated April 18th, 1901, may be adjudged and decreed to be invalid, as procured by fraud, and to have been and to be a mortgage, and that it was given only as collateral security for the payment of said indebtedness of three thousand five hundred dollars (\$3,500.00), with legal interest thereon, and that said interest may be ascertained and computed by this Court.

(4) That it be adjudged and decreed that the New York Finance Company was not a bona fide purchaser from Frank L. Rabe, and that the complainants herein were not bona fide purchasers from the New York Finance Company.

(5) That the complainants may be ordered and directed by this Court to receive and accept a sum equal to one-half of the said loan of three thousand five hundred dollars (\$3,500.00), with legal interest thereon from April 18th, 1901, as ascertained and computed by this Court, and that, upon payment of said sum of money into the Court by the respondent, Conrad Morris Braker, the said assignments from Conrad Morris Braker to Frank L. Rabe and from Frank L. Rabe to the New York Finance Company, and from the New York Finance Company to the complainants, and from the complainants to Charles C. Wolff, and from Charles C. Wolff to the complainants be discharged and cancelled.

(6) That the bill of complaint herein be dismissed with costs, and

(7) That the respondent, Conrad Morris Braker, may have such other and further judgment, order or

relief in the premises as may seem to this Court just and equitable.

SAFFORD A. CRUMMEY,
Solicitor for Respondent,
Conrad Morris Braker.

Office and P. O. Address, 165
Broadway, Borough of Man-
hattan, New York City.

Dated, New York City,
May 20th, 1913.

**COMPLAINANTS' REPLY TO ANSWER OF RE-
SPONDENT, CONRAD MORRIS BRAKER.**

(Filed May 31, 1913.)

These complainants, John A. S. Brown and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, repeating and affirming the averments made by them in the Bill of Complaint heretofore filed in this cause, in reply to the so-called "Answer" of Conrad Morris Braker, respondent herein:

First.—Admit the allegations contained in the paragraph marked "Twenty-first" in said "Answer."

Second.—Admit the allegation contained in para-
graph marked "Twenty-second" in said "Answer."

Third.—Admit the allegations contained in the paragraph marked "Twenty-third" in said "Answer."

Fourth.—Admit the allegations contained in the paragraph marked "Twenty-fourth" in said "An-
swer."

Fifth.—Admit the allegations contained in the paragraph marked "Twenty-fifth" in said "Answer."

Sixth.—Deny the allegations contained in the paragraph marked "Twenty-sixth" of said "Answer," except that complainants admit that the said Conrad Morris Braker attained the age of fifty-five years on the 25th day of February, 1913.

Seventh.—In answer to the paragraphs marked "Twenty-seventh," "Twenty-eighth," "Twenty-ninth," "Thirtieth," "Thirty-first," "Thirty-second," "Thirty-third," "Thirty-fourth," "Thirty-fifth" and "Thirty-sixth" of said "Answer," complainants deny each and every allegation therein contained; that no loan in the sum of \$3500, or in any sum whatever, was, on or about the 18th day of April, 1901, made by the said New York Finance Company or by Charles H. Burr, Arthur W. Depue and any person or persons associated with them, to Conrad Morris Braker. On the contrary, complainants aver that on the 18th day of April, 1901, Conrad Morris Braker sold absolutely to one Frank L. Rabe seven-tenths of his contingent interest in his father's estate, as is fully averred and set forth in complainant's Bill.

Eighth.—Admit the allegations contained in the paragraph marked "Thirty-seventh" of said "Answer," except that complainants neither admit nor deny the allegation that the assignment of December 19th, 1906, was without the knowledge of the respondent, but asks that if the same be competent, relevant and material, due proof thereof be made.

Ninth.—Deny the allegations contained in the paragraph marked "Thirty-eighth" of said "Answer."

Tenth.—Deny the allegations contained in the paragraph marked "Thirty-ninth" of said "Answer."

Eleventh.—Deny the allegations contained in the paragraph marked "Fortieth" of said "Answer."

Twelfth.—Deny the allegations contained in the paragraph marked "Forty-first" in said "Answer," except that complainants admit that they caused to be sold at public auction, the interest received by them under the assignment from the New York Finance Company to the plaintiffs, dated December 19th, 1906, to Charles Z. Wolff, and that thereafter assignments dated May 6th, 1911, were executed and delivered by the complainants to the said Charles Z. Wolff and from the said Charles Z. Wolff back to the complainants, as averred in the Bill of Complaint hereinbefore filed.

Thirteenth.—Neither admit nor deny the allegations contained in the paragraph marked "Forty-second" in said "Answer," and are advised by counsel, believe and therefore say that the same are not material, competent or relevant, and further that any attempted election by Conrad Morris Braker to avoid the assignment, averred in the Bill of Complaint heretofore filed herein, to have been made by him, of the interest bequeathed to him under the "Fifteenth" paragraph of the said Last Will and Testament of his father, Conrad Braker, Jr., deceased, are void and of none effect.

Fourteenth.—Neither admit nor deny the allegations contained in the paragraph marked "Forty-third" in said "Answer," and ask that if the same be competent, relevant and material, due proof thereof be made.

Fifteenth.—Neither admit nor deny the allegations contained in the paragraph marked "Forty-fourth" in said "Answer," and ask that if the same

be competent, material and relevant, due proof thereof be made.

Sixteenth.—In answer to the paragraph marked “Forty-fifth of said ‘‘Answer,’’ repeat the averments contained in the preceding paragraphs of this Reply, numbered First, Second, Third, Fourth, Fifth and Sixth, and make the same a part of their reply to said paragraph marked “Forty-fifth.”

Seventeenth.—Deny the allegations contained in the paragraph numbered “Forty-sixth” in said “Answer,” except that complainants aver that they have no knowledge or information sufficient to form a belief as to the truth of the allegation that the said respondent was, on the 18th day of April, 1901, a resident of Stamford, in the State of Connecticut.

Eighteenth.—Deny the allegations contained in paragraphs marked “Forty-seventh” and “Forty-eighth” of said “Answer.”

Nineteenth.—Deny the allegations contained in paragraph marked “Forty-ninth” in said “Answer.”

Twentieth.—Deny the allegations contained in the paragraph marked “Fiftieth” of said “Answer.”

Twenty-first.—Deny the allegations contained in the paragraph marked “Fifty-first” in said “Answer.”

Twenty-second.—Deny the allegations contained in the paragraph marked “Fifty-second” in said “Answer.”

Twenty-third.—Deny the allegations contained in the paragraph marked “Fifty-third” of said “Answer.”

Twenty-fourth.—Admit that the New York Finance Company was incorporated during the year

1901, as averred in the paragraph marked "Twenty-fourth" of said "Answer"; that the certificate of incorporation was filed September 30th, 1901, in the office of the Clerk of the County of New York; but complainants have no knowledge as to the incorporators of said Company, except that they are informed, believe and aver that neither Charles H. Burr nor Arthur W. Depue were incorporators of said New York Finance Company.

Twenty-fifth.—Deny the allegations contained in paragraph marked "Fifty-fifth" in said "Answer," except that complainants admit that the New York Finance Company commenced business on or about the first day of October, 1901.

Twenty-sixth.—Deny the allegations contained in the paragraph marked "Fifty-sixth" in said "Answer." Complainants repeat the averments made by them in the paragraph numbered "Tenth" in the Bill of Complaint as to the assignment by Frank L. Rabe to the New York Finance Company under date of October 1st, 1901. They deny that said transaction was a cover or cloak for any transaction not appearing in said assignment. They deny that the said assignment made by Rabe to the New York Finance Company was made without consideration, but aver that the consideration therefor was an adequate, valid consideration paid by the said New York Finance Company to the said Rabe and vested in the said New York Finance Company title in fee to the interest assigned therein; that the said New York Finance Company was a bona fide purchaser for value thereof, and that the transaction was not in any respect a loan, but was a complete sale and conveyance.

Twenty-seventh.—Deny the allegations contained in the paragraph marked "Fifty-seventh" of said "Answer."

Twenty-eighth.—Admit the allegations contained in the paragraph marked "Fifty-eighth" of said "Answer," except that complainants neither admit nor deny that the assignment referred to in the said paragraph was without the knowledge of the said Conrad Morris Braker, but ask that if the same be competent, relevant and material, due proof thereof be made.

Twenty-ninth.—Neither admit nor deny the allegations contained in the paragraph marked "Fifty-ninth" of said "Answer," but ask that if the same be relevant, competent and material, due proof thereof be made. Complainants, however, deny that Charles H. Burr, Arthur W. Depue, or either of them, ever transacted business under the name of the New York Finance Company.

Thirtieth.—Deny the allegations of the paragraph marked "Sixtieth" in said "Answer."

Thirty-first.—Deny the allegations contained in paragraph marked "Sixty-first" of said "Answer."

Thirty-second.—Deny the allegations contained in the paragraph marked "Sixty-second" in said "Answer," except that complainants admit that they caused to be sold at public auction the interest received by them under the assignment from the New York Finance Company to the plaintiffs, dated December 19th, 1906, to Charles Z. Wolff, and that thereafter assignments dated May 6th, 1911, were executed and delivered by the said complainants to the said Charles Z. Wolff and from the said Charles Z. Wolff back to the complainants.

Thirty-third.—Neither admit nor deny the allegations contained in the paragraph marked "Sixty-third" in said "Answer," and are advised by counsel, believe and therefore say that the same are not material, competent and relevant, and further that any attempted election by Conrad Morris Braker to avoid the assignments of the interest bequeathed to him under the Last Will and Testament of his father, Conrad Braker, Jr., are void and of none effect.

Thirty-fourth.—Neither admit nor deny the allegations contained in the paragraph marked "Sixty-fourth" of said "Answer," and ask that if the same be competent, material and relevant, due proof thereof be made.

Thirty-fifth.—In answer to the offer and tender of the respondent, Conrad Morris Braker, as set forth in paragraph "Sixty-fifth" of said "Answer," complainants aver that the said Conrad Morris Braker is now falsely and fraudulently pretending and alleging that the absolute sale and assignment of his interest in the estate of his father, Conrad Braker, Jr., averred to have been sold and assigned by him to Frank L. Rabe, as set forth in paragraph numbered "Ninth" in the Bill of Complaint, was in effect security for a loan, and is endeavoring to secure the aid of this Court in forcing complainants to deliver up this assignment for cancellation upon repayment of the purchase price of a part of the purchase price thereof.

Thirty-sixth.—Neither admit nor deny the allegations contained in the paragraph marked "Sixty-sixth" of said "Answer," and ask that if the same be relevant, competent and material, due proof thereof be made.

Thirty-seventh.—Deny the allegations contained in the paragraph marked "Sixty-seventh" of said "Answer."

Thirty-eighth.—Complainants neither admit nor deny the matters alleged in the paragraph marked "Sixty-eighth," in said "Answer," and ask that if the same be competent, relevant and material, due proof thereof be made; except that complainants deny that the assignment referred to and described in paragraph "Tenth" of the Bill of Complaint and the negotiations, engagements, conferences and conference had in Pennsylvania were in any respect contrary to the laws of that State or of the State of New York.

Thirty-ninth.—Complainants further aver and show that the "Answer" of the said Conrad Morris Braker attempts to set up a counter-claim or cross-bill, and asks as affirmative relief that (a) the said conveyance and assignment by the said Conrad Morris Braker to the New York Finance Company, dated April 18th, 1901, be annulled and cancelled; or (b) be reformed into a mortgage.

Complainants show to your Honorable Court that it is provided by Section 397 of the Code of Civil Procedure of the State of New York that a cause of action upon which an action cannot be maintained under the Statute of Limitations of the State of New York cannot be effectually interposed as a defence or counter-claim; and that the counter-claims or defences attempted to be set up by the said Conrad Morris Braker in his said Answer constitute alleged causes of action which are barred by the Statute of Limitations of the State of New York as appears from the following facts.

Insofar as the counter-claim or defence or prayer for affirmative relief is based on the ground of the

penalty provided by the laws of the State of New York for usury, the said Conrad Morris Braker is barred by the Third paragraph of Section 383 and by Section 388 of the Code of Civil Procedure in the State of New York because the aforesaid conveyance and assignment and the transaction relating thereto were concluded on or about April 18th, 1901, a period of more than three years and a period of more than ten years prior to the institution of this action, and prior to the filing of the "Answer" or Cross-bill herein; and any and all right of action vested in Conrad Morris Braker to obtain the cancellation of said conveyance or assignment on the ground of usury, even if there ever was any such right of action, which complainants deny, accrued on or about the 18th day of April, 1901, and that no action has ever been begun by the said Conrad Morris Braker to cancel or to have declared void the said assignment.

Insofar as the counter-claim or defense or prayer for affirmative relief is based on the ground that the sale of the legacy described in the Bill of Complaint was in reality a mortgage, the said Conrad Morris Braker is barred by the Statute of Limitations of the State of New York, contained in Title II of Chapter 4 of the Code of Civil Procedure of the State of New York, and particularly by Section 388 thereof, because the aforesaid conveyance and assignment and the transaction relating thereto were concluded on or about April, 1901, a period of more than ten years prior to the institution of this suit, and prior to the filing of the Answer or Cross-bill herein; and any and all right of action vested in Conrad Morris Braker to reform the said conveyance or assignment on the ground that the same was in reality a mortgage, even if there ever was any such right of action, which the complainants deny,

accrued on or about the 18th day of April, 1901, and that no action has ever been begun by the said Conrad Morris Braker to reform the said instrument, or to have the same declared operative as a mortgage.

Fortieth.—Deny the allegations contained in the paragraph marked "Sixty-ninth" of said "Answer."

Forty-first.—Deny the allegations of the paragraph marked "Seventieth" of the said "Answer."

Forty-second.—Deny the allegations contained in the paragraph marked "Seventy-first" in said "Answer."

WHEREFORE, complainants pray that insofar as the said "Answer" asks for affirmative relief, the same may be dismissed, and that the relief prayed for in the Bill heretofore filed in this cause be granted to complainants.

JOHN A. S. BROWN,
FRANK E. SCHERMERHORN,
*As Trustee for Clara Schermerhorn,
under the Last Will and Testament of
Thomas Cunningham, deceased,*

By their Solicitor:

FREDRIC W. FROST,
60 Wall Street,
Borough of Manhattan,
New York City, N. Y.

**NOTICE OF MOTION OF DEFENDANT BRAKER
FOR DISMISSAL OF BILL.**

(Filed March 27th, 1914.)

Sir:

PLEASE TAKE NOTICE, that upon all the pleadings and proceedings had herein, I shall move this Court before the Judge assigned to hear motions on Friday, the 27th day of March, 1914, at the Post Office Building, Borough of Manhattan, City of New York, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the bill of complaint herein, with costs. Dated, March 21, 1914.

Yours, etc.,

SAFFORD A. CRUMMEY,
*Solicitor for Respondent, Conrad
Morris Braker.*

To:

FREDRIC W. FROST,
Solicitor for Complainants.

**NOTICE OF MOTION OF DEFENDANT
FLETCHER AS TESTAMENTARY TRUSTEE
FOR DECRETAL ORDER OF DISMISSAL.**

(Filed March 27th, 1914.)

Sir:

You will please take notice that upon the bill of complaint and the answer herein, a motion will be made before one of the justices of this court, at a term of this court for the hearing of motions, to be held at the court room thereof, No. 66, U. S. General Post Office Building (or such other room as may be designated),

Notice of Motion for Decretal Order 103

in the City of New York, Borough of Manhattan, at 10.30 A. M. on the 27th day of March, 1914, or as soon thereafter as counsel may be heard for a decretal order dismissing this suit with costs against the plaintiffs, on the ground that this court has not cognizance of the suit, or for such other order in the premises as may be just.

Dated, March 21, 1914.

Yours, etc.,

WILLIAM P. S. MELVIN,
Atty. for Deft. A. B. Fletcher,
165 Broadway, New York City, N. Y.

To:

FREDRIC W. FROST, Esq.,
Atty. for Plffs.

ORDER DISMISSING SUIT.

(Filed March 27, 1914.)

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the General Post-Office Building, in the City and County of New York, on the 27th day of March, 1914.

Present: HON. E. HENRY LACOMBE,

Judge.

JOHN A. S. BROWN, a Citizen of the State of Pennsylvania, and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, Deceased, and a Citizen of the State of Pennsylvania,

Plaintiffs,

against

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York, and CONRAD MORRIS BRAKER, a Citizen of the State of New York,

Defendants.

Equity 10.
Page 112.

On reading and filing the notice of motion on behalf of the several defendants herein for the dismissal of the suit on the ground that this District Court has no cognizance of the same in that the suit could not be prosecuted in this court, if no assignment had been made, the court having considered the bill of complaint

and the answers herein on the part of said defendants.

Now, after hearing Mr. William P. S. Melvin, counsel for said defendant, Austin B. Fletcher, as testamentary trustee, etc., and Safford A. Crummey, counsel for defendant, Conrad Morris Braker, in favor of the motion, and Mr. Charles H. Burr, of counsel for the plaintiffs in opposition,

It is ORDERED that this suit be and the same is hereby dismissed with costs to each defendant to be taxed by the Clerk.

E. HENRY LACOMBE,
U. S. C. J.

PETITION FOR APPEAL AND ALLOWANCE.

(Filed March 27th, 1914.)

*To the Honorable E. Henry Lacombe, District Judge
of the Southern District of New York:*

Your petitioners, JOHN A. S. BROWN, and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, the above-named plaintiffs conceiving themselves aggrieved by the Decree made and entered on the 27 day of March, 1914, in the above entitled cause, by which said Decree the Bill filed by your petitioners was dismissed, on the sole ground that upon all the pleadings and proceedings had therein no jurisdiction of the District Court of the United States existed, and the suit was dismissed for that reason alone, do hereby appeal from said Order and Decree to the Supreme Court of the United States, as authorized by Section 238 of the Judicial Code, for the reasons specified in the Assignments of Error filed here-

with, and your petitioners pray that this appeal may be allowed, and that a Transcript of the Record, proceedings and papers upon which the said Decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 27 day of March, 1914.

FREDERIC W. FROST,
Attorney for Petitioners.

The foregoing claim of appeal is allowed, Bond to be entered in the sum of \$250.00 to be approved by the Clerk.

Dated this 27 day of March, 1914.

E. HENRY LACOMBE,
United States Circuit Judge.

**CERTIFICATE UNDER SECTION 238 OF THE
JUDICIAL CODE.**

(Filed March 27th, 1914.)

In this cause I HEREBY CERTIFY that this appeal is granted solely, and that the order of dismissal of the Bill herein made is based solely on the ground that no jurisdiction of the District Court existed; that this question has been so determined by me on the ground that one of the defendants herein was the assignor of an interest in a decedent's estate, which interest was assigned to the complainants herein, and that the said defendant assignor is a citizen of the same State as his co-defendant.

This Certificate is made conformably to Section 238 of the Judicial Code.

E. HENRY LACOMBE,
United States Circuit Judge.

ASSIGNMENTS OF ERROR.

(Filed March 27th, 1914.)

Your petitioners, JOHN A. S. BROWN, and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, pray an appeal from the final Decree of this Court to the Supreme Court of the United States, and assign for error:

First.—That the learned District Court erred in dismissing the Bill in the above-entitled cause for lack of jurisdiction.

Second.—The learned District Court erred in refusing to maintain jurisdiction of the above-entitled cause.

FREDRIC W. FROST,
Attorney for Petitioners.

CITATION AND SERVICE.

(Filed April 2nd, 1914.)

UNITED STATES OF AMERICA, *ss.*:

To Austin B. Fletcher as Testimentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and Conrad Morris Braker, a citizen of the State of New York,
GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a Supreme Court of the United States to be holden at the City of Washington within 30 days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States for the Southern District of New York, and filed in the Clerk's office of said Court on the 27th day of March, 1914, in a cause wherein John A. S. Brown, a citizen of

108 Stipulation as to Contents of Record on Appeal

the State of Pennsylvania, and Frank E. Schermerhorn as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania are appellants, and Austin B. Fletcher as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and Conrad Morris Braker, a citizen of the State of New York, are respondents, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, HON. EDWARD DOUGLAS WHITE, Chief Justice of the United States this 31st day of March, in the year of our Lord, One thousand nine hundred and fourteen.

E. HENRY LACOMBE,
United States Circuit Judge.

Due and proper service of the within citation is admitted this 2nd day of April, 1914.

WM. P. S. MELVIN,
*Solicitor for Respdt. Fletcher as
Trustee, etc.*

S. A. CRUMMEY,
Solicitor for Respdt. Braker.

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL.

(Filed April 16th, 1914)

IT IS HEREBY STIPULATED AND AGREED by and between the solicitors for the respective parties in the above entitled action that the portions of the record

Stipulation as to Contents of Record on Appeal 109

which shall constitute the transcript of record on appeal in said action shall consist of the following only:

1. Bill of complaint.
2. Answer of defendant Austin B. Fletcher, as testamentary trustee.
3. Answer of defendant Conrad Morris Braker.
4. Complainants' Reply to the answer of Conrad Morris Braker.
5. Notice of motion on behalf of defendant Conrad Morris Braker for dismissal of the Bill of Complaint.
6. Notice of motion on behalf of defendant Austin B. Fletcher, as testamentary trustee, for decreeal order of dismissal.
7. Order of March 27, 1914, dismissing suit.
8. Petition for appeal and allowance.
9. Certificate under Sec. 238 of Judicial Code.
10. Assignments of error.
11. Citation.
12. This stipulation.

And the Clerk of the United States District Court for the Southern District of New York is hereby directed to transmit only the above mentioned papers.

Dated New York, March 31, 1914.

FREDRIC W. FROST,
Solicitor for Complainants-Appellants.

WILLIAM P. S. MELVIN,
Solicitor for Defendant-Respondent, Austin B. Fletcher, as Testamentary Trustee &c.

SAFFORD A. CRUMMEY,
Solicitor for Defendant-Respondent, Conrad Morris Braker.

110 Stipulation as to Transcript of Record

**STIPULATION AS TO TRANSCRIPT OF RECORD
AS PRINTED.**

(Filed April 18th, 1914.)

It is hereby stipulated and agreed by and between the Complainants-Appellants and the Defendants-Appellees in the above-entitled action, binding upon the parties to said action, that the foregoing printed copy is a true transcript of the record as agreed on by the parties to said action.

Dated, April 18th, 1914.

FREDRIC W. FROST,

Attorney for Complainants-Appellants.

WILLIAM P. S. MELVIN,

*Attorney for Defendant-Appellee,
Austin B. Fletcher, as Testa-
mentary Trustee, etc.*

SAFFORD A. CRUMMEY,

*Attorney for Defendant-Appellee,
Conrad Morris Braker.*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

JOHN A. S. BROWN, a Citizen of the State
of Pennsylvania, and FRANK E. SCHER-
MERHORN, as Trustee for Clara Scher-
merhorn, under the Last Will and
Testament of Thomas Cunningham,
Deceased, and a Citizen of the State of
Pennsylvania,

against

Equity-10
No. 112.

AUSTIN B. FLETCHER, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament of
Conrad Braker, Jr., Deceased, and a
Citizen of the State of New York, and
CONRAD MORRIS BRAKER, a Citizen of the
State of New York.

I, ALEXANDER GILCHRIST, JR., Clerk of the District
Court of the United States of America for the South-
ern District of New York, do hereby certify that the
foregoing is a correct transcript of the record of the
said District Court in the above-entitled matter as
agreed on by the parties.

In Testimony Whereof, I have caused the seal
of the said Court to be hereunto affixed,
at the City of New York, in the Southern
District of New York, this 18th day of
(Seal) April in the year of our Lord one thou-
sand nine hundred and fourteen and of
the Independence of the said United
States the one hundred and thirty-eighth.

ALEXANDER GILCHRIST, JR.,
Clerk.

FILED

APR 30 1914

JAMES D. MAHER
CLERK

No. 1027. 454

October Term, 1913.

IN THE

Supreme Court of the United States

JOHN A. S. BROWN, and FRANK E. SCHERMERHORN, Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, Deceased,

Appellants,

versus

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and Conrad Morris Braker,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Motion to Advance and Brief on Behalf of Appellants.

FREDRIC W. FROST,
CHARLES H. BURR,

Solicitors for Appellants.

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IN THE

Supreme Court of the United States,

JOHN A. S. BROWN AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED,

Appellants,

v.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND CONRAD MORRIS BRAKER,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

AND Now, this Eleventh of May, 1914, come the Appellants, by their Counsel, and move the Court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below, and this Appeal is taken under Section 238 of the Judicial Code.

FREDRIC W. FROST,
CHARLES H. BURR,
Solicitors for Appellants.

EASTERN DISTRICT OF PENNSYLVANIA, ss.:

RAYMOND C. KARGE, being duly sworn according to law, deposes and says; that on the eighteenth day of April, 1914, he deposited in the mail at the General Post Office, in the City of Philadelphia, Pennsylvania, a notice in the form attached hereto as Exhibit "A" and 5 copies of this Brief, addressed to Safford A. Crummey, Esq., 165 Broadway, New York City, N. Y., and to William P. S. Melvin, Esq., 165 Broadway, New York City, N. Y., the proper address of the counsel for the Appellees, duly postpaid, and that by due course of mail the said letters would reach the counsel for the Appellees on April twentieth, 1914.

RAYMOND C. KARGE.

Sworn to and subscribed before me, this Eighteenth day of April, 1914.

(Seal)

GEORGE KOPPENHOEFER, JR.

Notary Public.

My Commission Expires March 10th, 1917.

EXHIBIT "A."

April 18, 1914.

Safford A. Crummey, Esq.,
and

William P. S. Melvin, Esq.,
165 Broadway,
New York City, N. Y.

Dear Sirs:—

Please take notice that on Monday, May 11th, 1914, we will present to the Supreme Court of the United States, in the matter of Brown, et al., v. Austin B. Fletcher, Testamentary Trustee, and Conrad Morris Braker, the motion, of which the enclosed is a copy. We also hand you herewith 5 copies of the brief which will be presented with the motion.

Yours respectfully,

FREDRIC W. FROST,

CHARLES H. BURR,

Solicitors for Appellants.

STATEMENT OF THE CASE.

This case is before the Court on the sole question of the jurisdiction of the District Court under Section 238 of the Judicial Code.

The Bill in equity was filed by appellants against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker under the last Will and Testament of Conrad Braker, Jr., deceased, and against Conrad Morris Braker, defendants below, appellees.

The Bill (Record, pp. 1-13) showed that Conrad Morris Braker is entitled to receive a trust fund of Fifty Thousand Dollars under the Fifteenth clause of the Will of Conrad Braker, Jr., upon attaining fifty-five years of age, and that he had attained that age. That Conrad Morris Braker had sold to complainants one-half of seven-tenths of his interest under the said Fifteenth clause of the said Will, amounting to the sum of Seventeen Thousand Five Hundred Dollars, and that the title to the said sum of \$17,500 had become vested in complainants. The prayer of the Bill was that title to the said \$17,500 might be decreed to be in complainants, and defendant Austin B. Fletcher, Trustee, directed to pay over the said sum.

Complainants were citizens of the State of Pennsylvania, and Austin B. Fletcher, Trustee, and Conrad Morris Braker, were citizens of the State of New York at the time of the filing of the Bill. Conrad Morris Braker, a defendant, had been the assignor of the aforesaid trust fund held by the other defendant as Trustee.

The learned District Judge dismissed the Bill, and his certificate (Record, p. 106) shows that the Bill was dismissed on the ground that Conrad Morris Braker, the defendant assignor, was a citizen of the same State as Austin B. Fletcher, the defendant Trustee.

From the decree dismissing the Bill this Appeal was taken in accordance with Section 238 of the Judicial Code.

SPECIFICATIONS OF ERROR.

First.—That the learned District Court erred in dismissing the Bill in the above-entitled cause for lack of jurisdiction.

Second.—The learned District Court erred in refusing to maintain jurisdiction of the above-entitled cause.

ARGUMENT.

The question presented is the simple one as to whether an interest in a trust fund is within the prohibitions of Section 24 (1st) of the Judicial Code.

It is submitted that the decisions of this Court show that an interest in a distributive share of an estate (*a fortiori* in a trust fund) is not within the statute, and that this principle has been recently determined by this Court in *Ingersoll v. Coram*, 211 U. S. 335.

The learned District Judge in the case of *Brown v. Fletcher*, now in this Court on certiorari, in overruling the demurrer of the defendant, held that "the interest of a *cestui que trust* in a sum of money held for him by a trustee" was not "what the statute meant by a 'chouse in action'." He cited the case of *Croxall v. Shererd*, 5 Wall. 268, and concluded:

"In respect of personal property also the *cestui que trust* is entitled to possession of the *res* unless its nature precludes; in short, he is entitled at least on a case like this to all absolute interest save the legal title and actual possession. It would be a piece of doubtful pedantry, I think, in view of the usual meaning of the word 'chouse in action' to apply it to a relation like that created by the fourteenth paragraph of the will."

In *Croxall v. Shererd*, 5 Wall. 268, the question was of the effect of a deed by a *cestui que trust*. This Court held:

"In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate" (at p. 281).

In *Deshler v. Dodge*, 16 How. 622, an action of replevin was brought by an assignee of a package of bank notes for their recovery. The Court held that such a suit was maintainable, and said:

"It is admitted the assignors in this case could not have maintained the suit in the federal courts. We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention; and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned" (at p. 630).

In *Bushnell v. Kennedy*, 9 Wall. 387, this Court discussed the question, and said:

"It has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a chose in action may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. And it has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents'; 'not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed'" (at pp. 391 and 392).

In *Ambler v. Eppinger*, 137 U. S. 480, the suit was to recover the value of certain trees and logs alleged to have been converted. The suit was by an assignee. This Court sustained the jurisdiction and quoted with approval the above cited case of *Deshler*.

v. Dodge, and Bushnell v. Kennedy, citing the latter case to hold "that the objection to the jurisdiction applied only to rights of action founded on contracts which contained within themselves some promise or duty to be performed" (at p. 483).

In *Bertha Zine & Mineral Company v. Vaughan*, 88 Fed. 566, a daughter of a decedent who had died intestate, assigned all of her interest in the estate, which by several mesne assignments passed to a corporation, the complainant. It filed its Bill against the administrator to recover the daughter's distributive share. The defendants were all citizens of Virginia, as well as the daughter, and the complainant was a New Jersey corporation.

Said the Court:

"It (the case under discussion) is not founded on a contract, nor brought to enforce a contract, but to enforce obligations incurred by administrators of an estate in their official capacity, by a failure to properly discharge their fiduciary duties. A non-resident assignee, bringing suit of this character, is entitled to have the same heard in this Court."

In *Ingersoll v. Coram*, the jurisdictional question involved is stated in the following language:

"It is charged that the right of the petitioner's intestate was derived from Root, and as he, it is further contended, could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the petitioner was equally disqualified to establish and recover Root's share of the property. The argument is that she is seeking to enforce a right of Root against the administrator arising on an equitable assignment by Root to her intestate, and she is therefore, it is said, suing to

recover as assignee of a chose in action upon which the assignor could not sue, because his citizenship is the same as that of the administrator in Massachusetts. Sec. 629, Rev. Stat." (at p. 361).

This Court then disposed of this jurisdictional objection in the following language:

"There are several answers to the contention. It is certainly very disputable if an interest in a distributive share of an estate is within the statute."

Certain additional reasons why jurisdiction existed were stated, which are not applicable to the case at bar; but it is evident that the precise question raised here was decided adversely to the appellees' contention by this Court.

In *Brown v. Fletcher*, 206 Fed. 461, now pending in this Court on certiorari, the Circuit Court of Appeals for the Second Circuit attempted to distinguish that case by saying:

"The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in *Ingersoll v. Coram*, 211 U. S. 336, but are asserting Braker's title to the sum of \$10,000 to which they say they have succeeded."

In *Ingersoll v. Coram*, Root was a claimant to a share in the estate of Davis. Root entered into an agreement with Leyson, which amounted to an equitable assignment of his share as a fee for professional services. While it is true that in the syllabus the legal effect of the agreement made between Ingersoll and Root is referred to as constituting "a lien on the distributive share of an heir of defendant's intestate," all through the opinion the interest is referred to indifferently as a lien or an equitable assignment. Thus, at

page 361, in the opinion of the Court, quoted above, the right sought to be enforced by the administrator is spoken of as "arising on an equitable assignment by Root to her intestate"; and on page 368 the Court cites with approval in support of its finding, *Fourth Street Bank v. Yardley*, 165 U. S. 634, where it was held, under the particular circumstances of the case, that, contrary to the usual rule, the check there given operates as an appropriation or *equitable assignment* of a fund in the hands of the drawee. Mr. Chief Justice White, in delivering the opinion in that case, said:

"The deduction arises that as it cannot be reasonably conceived that the loan would have been made without the reference to an *assignment of the particular fund*, from which loan the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation charge or lien on the property, upon the faith of which they both dealt."

It is therefore submitted that this is a distinction without a difference, because the lien referred to in *Ingersoll v. Coram* was not a statutory lien or a lien arising simply out of the employment, but resulted from an instrument of writing, the legal effect of which was to constitute an equitable assignment by Root of a portion of his distributive share in the estate of Davis, just as Braker here assigned a portion of his distributive share to Brown and Sehermerhorn; Root and the Trustee of Davis' Estate, being citizens of the same State, just as Braker and Fletcher, Trustee, are in the case at bar.

In conclusion, it is respectfully urged that the facts and the decision of this Court in *Ingersoll v. Coram* have foreclosed the question of jurisdiction as applicable to the case at bar. But if any distinction, unperceived by counsel for appellants, exists, it is submitted

that a suit against a trustee to establish a lien upon a distributive share in a decedent's estate can hardly be described as a suit to recover the contents of a chose in action, and that the trend and character of the decisions of this Court establish the principle that such suit is without the statute.

FREDRIC W. FROST,
CHARLES H. BURR,
Solicitors for Appellants.

³
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No. 1027.

Office Supreme Court, U.S.
FILED
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JAMES D. MAHER
CLERK

No. 1027

October Term, 1913.

Supreme Court of the United States

JOHN A. S. BROWN and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellees.

**BRIEF ON PART OF AUSTIN B.
FLETCHER, AS TRUSTEE, &c.,
APPELLEE.**

**WILLIAM P. S. MELVIN,
Solicitor for defendant
Austin B. Fletcher, Appellee.**

**SAFFORD A. CRUMMETT,
Solicitor for Defendant,
Conrad Morris Braker.**

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Supreme Court of the United States

JOHN A. S. BROWN and FRANK
E. SCHERMERHORN, as Trustee
for Clara Schermerhorn, under
the Last Will and Testament
of Thomas Cunningham, de-
ceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testa-
mentary Trustee of Conrad
Morris Braker, under the Last
Will and Testament of Conrad
Braker, Jr., deceased, and
CONRAD MORRIS BRAKER,

Appellees.

Statement of the Case.

The bill of complaint shows that one Conrad Braker, Jr., by the fifteenth section or paragraph of his last Will and Testament established a trust

fund of \$50,000.00 in favor of Conrad Morris Braker, making Henry J. Braker the trustee thereof, and that under its terms he was directed to hold the same for the use of said *cestui que trust* until he should be fifty-five years of age, which would be on February 25, 1913. That the defendant, Austin B. Fletcher, on November 16, 1897, was appointed trustee by the Surrogates' Court of the County of New York to succeed Henry J. Braker and to execute the unexecuted trusts under the will, and that he now holds said trust fund (pages 2, 3, 4, 19).

The bill shows the following assignment to have been made by the *cestui que trust*, Conrad Morris Braker, of an interest in said trust fund, and also shows the *mesne* assignments thereof subsequently made and hereinafter enumerated until such interest was finally lodged in the hands of the complainants.

FIRST.—On April 18, 1901, the defendant and *cestui que trust*, Conrad Morris Braker, by deed of assignment transferred to one Frank L. Rabe seven-tenths of all his interest in said trust fund (page 4; Exhibit B., pages 22-27).

SECOND.—On October 1, 1901, Frank L. Rabe, by deed of assignment transferred to the New York Finance Company the interest he had acquired in said trust fund from Conrad Morris Braker (page 5; Ex. C., pages 28-31).

THIRD.—On December 19, 1906, the New York Finance Company by deed of assignment transferred to the complainants "all monies coming to it under and by virtue of the aforementioned assignment, bearing date April 18, 1901, and duly assigned to the said New York Finance Company

* * * and also all and every its estate, right, title and interest in and to such *moneys*, or any part thereof" (pages 6, 7; Ex. F., pages 39-42).

This deed of assignment was given as collateral for the purpose of securing the payment to the complainants of the promissory note of the New York Finance Company of even date therewith for \$10,000.00 payable on July 21, 1910 (pages 6, 7; Ex. "E." page 38). The note provided for a sale of the security in case of there being default in its payment, and such default having occurred, the collateral was sold at public sale and bought by one Charles Z. Wolff.

FOURTH.—On May 6, 1911, the complainants, by deed of assignment, transferred to Charles Z. Wolff "the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit: a one-half of the certain estate, right, title and interest (and any and all moneys coming to the said New York Finance Company therefrom), assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901" (page 8; Ex. G., pages 42-49).

FIFTH.—On May 6, 1911, Charles Z. Wolff, by deed of assignment, reconveyed to complainants and by the same terms, all the interests mentioned in the deed immediately preceding (page 8; Ex. H., pages 49-55).

The prayer of the bill is that the complainants may be declared entitled to the immediate posses-

sion of the one-half of seven-tenths of the legacy of \$50,000.00 payable under the fifteenth paragraph of the will.

The defendants answered separately. The answer of the defendant Austin B. Fletcher shows by allegation XV (page 59), as a second defense, that upon the face of the bill, the District Court had not cognizance of the suit.

On March 27, 1914, a motion was made on the part of the defendant Austin B. Fletcher before one of the justices of the U. S. District Court for the Southern District of New York, upon the bill of complaint and the defendant's answer for a decretal order dismissing the suit on the ground that the Court had not cognizance thereof (page 102), and upon the hearing the suit was ordered dismissed (page 104).

Argument.

The only question presented to the court on this appeal is whether the assignment on April 18, 1901, by the defendant Braker to one Rabe of his interest in a trust fund established for his benefit, was an assignment of a *chase in action*, and, if so, whether the District Court for the Southern District of New York was precluded from taking cognizance of the suit brought against the trustee and *cestui que trust* to enforce the assignment because of the provision of the Judicial Code (Sec. 24, First Par.) prohibiting the entertainment of any such suit in the court unless it might have been prosecuted in the court if no assignment had been made,—it appearing by the bill that both the trustee and the *cestui que trust* are citizens of the State of New York.

The above section of the Judicial Code contains a law that has stood with but slight change since the time of its promulgation by the Judiciary Act of 1789. Its language almost continuously since that time has been against the cognizance by the trial court of a suit "*to recover the contents of any promissory note or other chase in action*"; now its prohibitory terms are against the cognizance of any suit "*to recover upon any promissory note or other chase in action*."

I except, of course, when referring to the time since the original promulgation of the act the period during which the amendment of 1875 was in operation (until March 2, 1887), when the prohibition was

against the cognizance "of any suit founded on a contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The change made by the present law,—“to recover upon any promissory note or other chose in action,” would seem to greatly enlarge the jurisdiction of the District Court, but, be this as it may, it does not affect this present controversy, for whether the law has reference to the contents of a *chose in action*, or simply to a *chose in action*, it is plain that in either case the Court can take no cognizance of this action. There is no doubt it is founded on a *chose in action*; that there has been an assignment of it and that by reason of the assignor's citizenship, the lower Court could not take cognizance.

Chief Justice Marshall said in *Sere vs. Pitot* (6 Cranch, 333), as to the term “other chose in action,” that it was broad enough to comprehend either those who could sue for legal or those who could sue by virtue of *equitable* assignments, and that the word “contents” was too ambiguous in its import to restrain that general term,—i. e. *chose in action*. The contents of a note, he said, are “the sum it shows to be due.”

In *Shoecraft vs. Bloxham* (124 U. S., 730; 31 L. ed., 574), the Court said:

“the contents of any promissory note, or other ‘chose in action,’ were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey the

meaning, but they have received a construction substantially to that purport in repeated decisions of this Court."

In Corbin vs. Black Hawk Co. (105 U. S., 659; 26 L. ed., 1136), which was a suit for the specific performance of contract for the purchase of land, Judge Blatchford said that such a suit must be regarded as one to recover the contents of a contract as a *chose in action*, and so not maintainable by an assignee if it could not have been prosecuted had no assignment been made. And he said that *equitable as well as legal assignments are included*. He said:

"The contents of a contract as a chose in action in the sense of Sec. 629 are the rights created by it in favor of the party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise."

This Court has itself given us a definition of what is a *chose in action*. In Sheldon vs. Sill, 49 U. S., 441; 12 L. ed., 1147, 1151, Judge Grier says:

"The term 'chose in action' is one of comprehensive import. It includes all the infinite varieties of contracts, covenants and

promises which confer on one party a right to recover a personal chattel or a sum of money by action."

In *Bushnell vs. Kennedy*, 9 Wall., 387; L. ed., 738, Chief Justice Chase says, regarding the term "chose in action," that

"under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract."

As used in the statute, there are no accompanying expressions whatever delimiting the breadth of the term "*chose in action*." We submit that Congress in framing the law did not design to lessen, or qualify, or restrict the significance of those words; on the contrary, their purpose was not to minimize, but to adopt a word of great scope, and the great aim of the statute was to prevent, as far as possible, the entertainment of any suits in the Federal Courts, other than those strictly arising between citizens of different states, apprehending that unless such care were taken, the courts would be overborne by the volume of suits cunningly brought before them by force of assignments more specious than real. The legislators were concerned that the jurisdiction of the Court should be such as to bar out all others than genuine assignments between citizens of different states.

Bushnell vs. Kennedy, 76 U. S., 387; 19 L. ed., 738.

Under the head "*chose*,"—"chooses in action." *Bouvier* in his Law Dictionary, gives us as definition—

"Personal things, of which the owner has not the possession, but merely a right of action for their possession."

And he refers to 2 Blackstone Comm., 389, 397.

In Blackstone we read:

"Property in chattels personal may be either in possession, which is where a man hath not only the right to enjoy but hath the actual enjoyment of the thing; or else, it is in action where a man hath only a bare right without any occupation or enjoyment."

Book 2, 389.

Again he says:

"We will proceed next to take a short view of the nature of property *in action*, or such where a man hath not the occupation but merely a bare right to occupy the thing in question the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chuse in action*."

Book 2, 397.

A *chuse in action* is said to be a thing not in occupation or enjoyment, but merely a bare right to be recovered by an action, hence its name.

U. S. vs. Moulton, 27 Fed. Cas., 11, 12.

An assignment of an interest in a testamentary trust fund is characterized as an assignment of a *chuse in action*.

Mercantile Trust Co. vs. Gumbernat, 143
N. Y. App. Div., 308.

A *chose in action*, or a thing in action, is a term used in contradistinction to a chose, or thing, in possession.

Ayres vs. West R. R. Co., 48 Barb., 135.

A *chose in action* includes all rights to personal property not in possession, which may be enforced by action.

Gillett vs. Fairchild, 4 Den., 80.

"It is a right of proceeding in a court of law to procure the payment of a sum of money. The term is used in contradistinction to choses in possession, which were chattels of which one is in possession or control, such as corn, wheat, books and the like.

One view has restricted the term to rights of action for money arising under contract, but while it comprehends these, whatever the contract, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property."

Citing Gillett vs. Fairchild, *supra*;
McKee vs. Judd, 12 N. Y., 622; Wms.
Pers. Prop., 4;
3 Am. & Eng. Encyc. Sub. Tit. "Choses
in action," 236.

The right to sue for a trust fund misapplied by the trustee is an *equitable chose in action* (*id.*).

A *chose in action* is defined to be "the interest in a contract which in case of non-performance can only be reduced into beneficial enjoyment by an action or suit."

Haskell vs. Blair, 57 Mass., 534, 536.

A life insurance policy has been held to be a chose in action,

Prudential Life Ins. Co. vs. Hann, 21 Ind. App., 525, 529,

even before the death of the insured.

Steele vs. Gatlin, 115 Ga., 929.

Pertinent, too, is the opinion of the Circuit Court of Appeals for the Second District in Brown vs. Fletcher (206 Fed. Rep., 461), a case very similar in its character to that now before the Court. It was a suit between the same complainants and this defendant-trustee to recover on the assignment made by the same *cestui que trust* of another trust fund created under the same will. In it the objection was raised, as now, to the Court's jurisdiction. Judge Learned Hand of the U. S. District Court in overruling the demurrer to the jurisdiction conceded by his opinion that upon the question whether the interest of the *cestui que trust* in the sum of money held for him by the trustee was or was not a *chose in action* under Sec. 24 of the Judiciary Act, such was no doubt the case in "strict legal theory," but he said that he did not think the *cestui que trust*'s "interest is what the statute meant by a *chose in action*." The cause went to hearing resulting in a decision on the merits in favor of the defendant. An appeal

was taken to the Circuit Court of Appeals, and again it was objected by the defendant that the lower court did not have jurisdiction, and the Appellate Court dismissed the suit upon that and other grounds.

The cause is now pending in this court on writ of certiorari.

The Circuit Court of Appeals says with reference to the assignment:

"This is clearly a *chase in action*, that is a claim not in possession, but which must be enforced by and against the trustee. Sheldon vs. Sill, 49 U. S., 441. As their assignors could not maintain an action in the District Court, the complainants cannot."

The endeavor is made to show that the ruling of the Court in Ingersoll vs. Coram (211 U. S., 335; 53 L. ed., 208), is applicable to the present case, but the circumstances are totally different. In that case a bargain was made for the employment of the legal services of Col. "Bob" Ingersoll, and his payment was to be made out of the amount that might be secured thereby. The matter involved the setting aside of the last will of Andrew J. Davis, a very wealthy man, and Ingersoll was successful in bringing about a compromise, and it was claimed that an equitable lien attached to the distributive share of the contestants, and that the suit by Ingersoll's widow and administratrix to have the Court declare and foreclose the lien on the distributive share was, because it was based on

the contract of employment, a suit within the statute governing Federal jurisdiction of suits by assignees of *choses in action*. Justice McKenna said it was certainly very disputable if an interest in a distributive share of an estate is within the statute, and the inference is now begged that this Court will look upon the assignment made by Conrad Morris Braker of his interest in the trust fund held for his benefit by Austin B. Fletcher growing out of the estate of Conrad Braker, Jr., as an interest in a distributive share of an estate. But it is sufficient answer to say that the estate of Conrad Braker, Jr., has been long since distributed; that the executors thereof paid into the hands of the trustee the entire trust fund established by the will of the decedent, and that no person other than the *cestui que trust* or his assignees have, so far as relates to the fund any concern in its management. It is an interest capable of being assigned, and the assignees now, by their bill of complaint, ask that the Court will decree the payment over to them by the trustee of the assignee's part of the fund.

The assignment is of a *chose in action*, and the citizenship of the assignor precludes the lower Court from taking cognizance of the suit.

**THE CASES CITED BY APPELLANTS
IN THEIR BRIEF (DESCHLER VS.
DODGE; BUSHNELL VS. KENNEDY;
AMBLER VS. EPPINGER; BERTHA ZINC
& MINERAL CO. VS. VAUGHAN) HAVE
NO APPLICATION WHATEVER TO THE
CAUSE BEFORE THE COURT.**

Each of these cases have to do with tortious causes of action assigned over to suitors which

were declared to be not within the statute. Deschler vs. Dodge was an action in replevin; Bushnell vs. Kennedy was for damages because of the loss of money which seems to have been wrongfully obtained from the possession of an agent entrusted with it; Ambler vs. Eppinger (137 U. S., 480; 34 L. ed., 765) was an action for trespass and damages; Bertha Zinc and Mineral Co. vs. Vaughan was an action against administrators and their sureties for a *derastarit*. Justice Field, in the case of Ambler vs. Eppinger, showed that the exception in the statute did not extend to suits growing out of some tortious act.

See to same effect

Mex. Nat. R. Co. vs. Davidson, 157 U. S.,
201; 39 L. e. 672-674.

Respectfully submitted,

WILLIAM P. S. MELVIN,
Solicitor for Defendant
Austin B. Fletcher, as Trustee.

STAFFORD A. CRUMMEY,
Solicitor for Defendant
Conrad Morris Braker.

Supreme Court of the United States

JOHN A. S. BROWN and FRANK
E. SCHERMERHORN, as trustee,
under the Last Will and Testa-
ment of Thomas Cunningham,
deceased,

vs.

AUSTIN B. FLETCHER, as testa-
mentary trustee of Conrad
Morris Braker, under the Last
Will and Testament of Conrad
Braker, Jr., deceased, and
CONRAD BRAKER.

No. 454.

BRIEF ON PART OF APPELLEES.

Statement.

This is a suit in equity brought by the plaintiffs in the District Court of the United States for the Southern District of New York, to obtain a judgment that they be declared entitled to the immediate possession of one-half of seven-tenths of a legacy of \$50,000.00 in a trust established by a testator (Conrad Braker, Jr.), by the 15th para-

graph of his will in favor of *his son*, Conrad Morris Braker, who is one of the defendants, and that the Court order and direct the defendant, Austin B. Fletcher, as trustee of the trust under the will, to pay to the plaintiffs said one-half of seven-tenths of the legacy aforesaid, amounting to the sum of \$17,500.00, and that the Court decree that said Conrad Morris Braker has no title or right in said one-half of seven-tenths of the legacy (pages 11-12 of Record).

The trustee named in the will of testator having resigned, the defendant, Austin B. Fletcher, was appointed in his stead by the Surrogates' Court of the County of New York to execute the unexecuted trusts under the will, one of which (so far as relates to this action) was the administration of the trusts created under its 15th and 16th provisions.

This will was admitted to probate on the 13th day of September, 1890, and under its 15th provision the testator established a trust fund of \$50,000.00 of which his son, the *cestui que trust*, was to have the use until he should attain the age of fifty-five years, which event would occur on the 25th day of February, 1913,—and thereupon should receive the principal of the trust fund.

Under the 16th provision of the will a trust fund was established of the rest, residue and remainder of testator's property. This also was in favor of the same son and under it he was likewise to have the use thereof until he should attain the age of fifty-five years, when he should be paid the principal.

On the 18th day of April, 1901, the *cestui que trust*, Conrad Morris Braker, made an assignment in writing to one Frank L. Rabe of seven-tenths of

all his right, title and interest to the \$50,000.00 trust fund under the 15th clause of the will, the intention being, as expressed in the assignment, that the assignee should receive the net sum of \$35,000.00 when and as soon as the same should grow due and payable, and that should the trust fund by any cause be thereafter diminished so that the assignee should not receive the sum of \$35,000 then, in such case, there was transferred to the assignee by the *cestui que trust* so much of his estate under the "Fifteenth" and "Sixteenth" clauses of the will as should make up the deficiency.

The deed of assignment was executed with formality under seal, witnessed and acknowledged and purports to have been recorded in the Registers Office of the County of New York and in the Surrogates' office of the County of New York (Exhibit "B," pages 22-28).

A few months after the execution of this assignment, Rabe, the assignee, made an assignment (October 1, 1901; Ex. "C," page 28) over to the New York Finance Company, a New York corporation, of all his estate, right and title in the interest of Conrad Morris Braker under clause "Fourteenth" and "Fifteenth" of said will.

(Note. It is unnecessary to refer in this statement to the interest that passed under the *fourteenth* clause of the will. Suffice it to say such interest is involved in another suit pending in this court under a writ of certiorari.)

Afterwards, on January 4, 1907, the assignee, Frank L. Rabe, made a supplemental assignment to said Finance Company for the purpose of rectifying a mistake in the preceding assignment whereby there had been an omission to include the interest

of Rabe under the "Sixteenth" clause of said will.

In the interval between the execution of these assignments by Rabe to the Finance Company, more particularly on December 14, 1906, the New York Finance Company gave its promissory note to the plaintiffs for \$10,000.00 payable July 21, 1910, and by its terms, as collateral security for its payment, gave in pledge an assignment to them a certain part of all its right, title and interest in the estate of Conrad Braker, Jr. The note and assignment are Exhibits "E" and "F" of the Bill (pages 38-42). The assignment in more particular terms transferred to them one-half part of all monies coming to the assignor under the said assignment made to Rabe by Conrad Morris Braker on April 18, 1901, which in turn had been transferred by Rabe to the New York Finance Company.

The promissory note not having been paid, the plaintiffs caused the said collateral to be sold at public auction on May 3rd, 1911, and the same was bought by one Charles Z. Wolff to whom a deed of assignment was given by the plaintiffs on May 6, 1911 (Ex. "G," pages 42-48), and the transferee, Wolff, by his deed made on the same day reassigned the same to the plaintiffs (Ex. "H," pages 49-55). The recitals in each of said last named deeds are the same, but the deed by Wolff recites the transfer to him of all the right, title and interest of the New York Finance Company in the estate of Conrad Braker, Jr., and it transfers to the plaintiffs all the estate, right, title and interest which he, Wolff, had or might be entitled to receive in, to or from the estate of Conrad Braker, Jr.

On the day when Conrad Morris Braker became fifty-five years of age (February 25, 1913), this suit was instituted by the plaintiffs.

The defendants answered separately, and each plead that upon the face of the bill the District Court had not cognizance of the suit (pages 59, 89).

On March 27, 1914, motions were made in the District Court on the part of each defendant for a decretal order dismissing the suit with costs on the ground that the Court had not cognizance of the same (page 102).

The motions to dismiss the suit were granted, and thereupon an order was made by the Court dismissing the suit with costs on the ground that the District Court had no cognizance of the same, inasmuch as the suit could not be prosecuted in the court if no assignment had been made (page 104).

The plaintiffs then petitioned for an allowance of an appeal to the Supreme Court of the United States under the provisions of Section 238 of the Judicial Code, which being allowed, the Court certified that the dismissal of the bill was made solely on the ground that no jurisdiction of the District Court existed; that the determination was on the ground that one of the defendants was the assignor of an interest in a decedent estate which interest was assigned to the complainants, and that the defendant assignor is a citizen of the same state as his co-defendant (pages 105-108).

Argument.

The bill of complaint of the plaintiffs herein was dismissed by the District Court on the ground solely that this was a suit to recover upon a chose in action in favor of an assignee, and that the suit could not be prosecuted in such court to recover

upon the chose in action if no assignment had been made.

The suit is brought by persons who by *mesne* assignments from the original assignee, have become possessed of a part of the vested interest of a *cestui que trust* in a testamentary trust fund held by his trustee for his benefit until he should attain the age of fifty-five years, and which was then to be paid over to him by the trustee. The trustee is the defendant, Austin B. Fletcher. The *cestui que trust* is the defendant, Conrad Morris Braker, and the bill of complaint shows that both trustee and *cestui que trust* are citizens of the State of New York.

POINT I.

The present statute fixing the jurisdiction of District Courts is unqualified in its expression that they cannot take cognizance of a suit to recover upon a CHOSE IN ACTION in favor of any assignee unless such suit might have been prosecuted in the court if no assignment had been made.

The following is the text of the Judicial Code so far as it affects the question now before the court:

"No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any as-

signee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

Sec. 24 Judicial Code, First Subdiv.

This law limiting the jurisdiction of the lower courts was first announced by Congress in Section 11 of the Judiciary Act of 1789 (Stat. at Large 78, Ch. 20) as follows:

"Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover the said contents if no assignment had been made."

This statute was reenacted in Section 629 of the Revised Statutes with slight modification, as follows:

"The Circuit Courts shall have original jurisdiction as follows:

FIRST.—Of all suits of a civil nature at common law or in equity * * * Provided that no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose of action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

Thus the law remained until 1875 when it was changed to read as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on a contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange."

But the Act of 1875 was amended and the law restored to practically the form in which it originally stood in 1789. This last amendment was made by the Acts of March 3, 1887, and of August 13, 1888, and is as follows:

"Nor shall any Circuit or District Court have cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

It will be observed that the changes made in the law by the Judicial Code are rather in its structure than in its substance, except in one particular which does not so much affect the question before the Court, as it serves perhaps to indicate that by the omission of the word "*contents*" (a word that had appeared in the law from the very

beginning), Congress purposed to remove the limitations that by its use in aid of construction the Court had placed upon the term "*chose in action*." The limitation being removed it would seem that the broadest interpretation to the term should now be given, with the result that many more cases are now excluded from cognizance by the District Court.

Chief Justice Marshall said in 1808, in *Sire vs. Pitot* (6 Cr., 335), commenting on the term "*chose in action*," that the word "*contents*" was too ambiguous in its import to restrain that general term; nevertheless, it will appear that the Court, in its subsequent history, has been controlled in its decisions by the association of the word "*contents*" with that term.

Thus in *Corbin vs. Black Hawk Co.* (105 U. S., 659, 26 L. e., 1136), a cause which originated in 1874, Judge Blatchford said:

"The *contents* of a contract as a *chose in action*, in the sense of Sec. 629 are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such *contents*. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the *contents* of the note, because there is nothing contained in the note but the promise."

Again, it was held in *Shoecraft vs. Bloxham* (124 U. S., 730, 31 L. e., 574) that a suit to enforce the

performance of a contract is a suit to recover *the contents of a chose in action*. The Court said:

"The terms used 'the contents of any promissory note or other chose in action' were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of Corbin vs. Black Hawk County, 105 U. S., 659 (26:1136) where the subject is fully considered and the decisions cited."

Reference has been made by the appellants to the cases of Deshler vs. Dodge, 1853, (16 How., 622); Bushnell vs. Kennedy, 1870, (9 Wall., 387); Ambler vs. Eppinger (137 U. S., 480); and Bertha Zinc and Mineral Company vs. Vaughan (88 Fed., 566) as in some way sustaining their contention here that the assignment is such a *chose in action* as may be maintained in the District Court notwithstanding the fact of the citizenship of the original assignor being the same as that of the trustee. But an inspection of all these cases will show that they were all founded on assignments of tortious claims, and the courts held that such claims were not within the restrictions of the statute because they did not have "*contents*"—the plain inference being that without such word the court would have given the term "*chose in action*" its full import and denied the jurisdiction of the lower court.

Judge Nelson said in Deshler vs. Dodge (*supra*):

"We are of the opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful caption or detention, and that it only applies to cases in which the suit is brought to recover the *contents*, or to enforce the contract contained in the instrument assigned."

POINT II.

The Supreme Court early defined what is a "chose in action," as the term is used in the statute, and the term has a familiar meaning in our law literature and decisions.

The Supreme Court has itself given us a definition of what is a *chose in action*. In Sheldon vs. Sill., (49 U. S., 411, 12 L. e., 1147, 1151), Judge Grier says:

"The term 'chose in action' is one of comprehensive import. It includes all the infinite varieties of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money by action."

In Bushnell vs. Kennedy (9 Wall., 387, 19 L. e., 738) Chief Justice Chase says, regarding the term:

"Under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contracts."

A *chuse in action* is said to be a thing not in occupation or enjoyment, but merely a bare right to be recovered by an action; hence its name.

U. S. vs. Moulton, 27 Fed. Cas., 11, 12.

An assignment of an interest in a testamentary trust fund is characterized as an assignment of a *chuse in action*.

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Under the head "Chose"—"Choses in action," Bouvier in his law dictionary gives as definition:

"Personal things of which the owner has not the possession, but merely a right of action for their possession."

And he refers to 2 Blacks. Comm., 389, 397. In Blackstone we read:

"Property in chattels personal may be either in possession, which is where a man hath not only the right to enjoy but hath the actual enjoyment of the thing; or else it is in action where a man hath only a bare right without any occupation or enjoyment."

Book 2, 389.

Again he says:

"We will proceed next to take a short view of the nature of property in *action*, or such

where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose in action.*"

Book 2, 397.

A chose in action, or a thing in action is a term used in contradistinction to a chose, or thing in possession.

Ayers vs. West R. R. Co., 48 Barb., 135.

A *chose in action* includes all rights to personal property not in possession, which may be enforced by action.

Gillett vs. Fairchild, 4 Den., 80.

A *chose in action* is defined to be the interest in a contract which in case of non-performance can only be reduced into beneficial enjoyment by an action or suit.

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A life insurance policy has been held to be a chose in action,

Prudential Life Ins. Co. vs. Hann, 21 Ind.

App., 525, 529,

even before the death of the insured.

Steele vs. Gablin, 115 Ga., 929.

"It is a right of proceeding in a court of law to procure the payment of a sum of money.

The term is used in contradistinction to choses in possession, which are chattels, of which one is in possession or control, such as corn, wheat, books and the like.

"One view has restricted the term to rights of action for money arising under contract, but while it comprehends these, whatever the contract, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property." Citing Gillett vs. Fairchild, *supra*; McKee vs. Judd, 12 N.Y., 622; Williams *Per. Prop.*, 4.

3 Am. & Eng. Ency., 1st ed. Sub Tit. "Choses in Action," 236.

Pertinent, too, is the opinion of the Circuit Court of Appeals in Brown vs. Fletcher (206 Fed. Rep., 461), a case very similar in its character to that now before the court. It is a suit between the same complainants and this defendant-trustee to recover upon the assignment made by the same *cestui que trust* of another trust fund created under the same will. In that case the objection was raised, as now, to the court's jurisdiction.

Judge Learned Hand of the U. S. District Court, in overruling the demurrer to the jurisdiction, conceded, in his opinion, upon the question whether the interest of the *cestui que trust* in the sum of money held for him by the trustee was a *chose in action* under Section 24 of the Judiciary Act, that such was, no doubt, the case in "strict legal theory," but he said that he did not think the *cestui que trust*'s interest was what the statute meant by

a *chose in action*. The cause went to hearing resulting in a decision on the merits in favor of the defendant. An appeal was taken to the Circuit Court of Appeals, and again it was objected by the defendant that the lower court did not have jurisdiction, and the Appellate Court dismissed the suit upon that and other grounds.

The cause is now pending in this court upon a writ of certiorari.

The Circuit Court of Appeals said in the case (206 Fed. Rep., 461) with reference to the assignment:

"This is clearly a *chose in action*, that is, a claim not in possession but which must be enforced by an action against the trustee. Sheldon vs. Sill (49 U. S., 441). As their assignors could not maintain an action in the District Court, the complainants cannot."

POINT III.

Equitable assignments of CHOSES IN ACTION, as well as legal assignments, are comprehended within the application of the statute.

The assignment by Conrad Morris Braker, the *cestui que trust*, on April 18, 1901, of seven-tenths of his interest in the trust fund held by his trustee, Austin B. Fletcher, was an equitable assignment.

Chief Justice Marshall said in *Sire vs. Pitot* (6 Cranch, 333):

"The words of the act are said to apply obviously to assignments made by the party

himself on an actual note, or other chose in action assignable by the proprietor thereof * * * without doubt assignable paper being the chose in action most usually transferred was in the minds of the legislature when the law was framed; and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature was not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity in his own name, and there would be as much reason to exclude him from the federal courts as to exclude the same person when the assignee of a particular note."

The foregoing case was referred to in Corbin vs. Black Hawk County (105 U. S., 659, 26 L. e., 1136) as one by which the principle was settled that the statute intended to except suits in virtue of equitable assignments, as well as suits by virtue of legal assignments.

POINT IV.

The assumption of the appellants that the opinion of the court in Ingersoll vs. Coram is determinative as to the jurisdictional question in this suit is erroneous.

The endeavor is made to show that the expression of the Court in Ingersoll vs. Coram (211 U. S.,

335, 53 I. ed., 208) is adverse to the defendants' contention in the present case, but the circumstances are totally different. In that case a bargain was made by would-be contestants for the employment of the legal services of Col. "Bob" Ingersoll, and his payment was to be made out of the amount that might be secured thereby. The matter involved the setting aside of the last will of Andrew J. Davis, a very wealthy man, and as a result of the suit instituted Ingersoll was successful in bringing about a compromise, and it was claimed that an equitable lien attached to the distributive shares so secured for the contestants, and that the suit by Ingersoll's widow and administratrix to have the Court declare and foreclose such lien on the distributive shares was, because it was based on the contract of employment, a suit within the statute governing federal jurisdiction of suits by assignees of choses in action. Justice McKenna said it was certainly very disputable if an interest in a distributive share of an estate is within the statute, and the inference is now begged that this Court will look upon the assignment made by Conrad Morris Braker of his interest in the trust fund held for his benefit by Austin B. Fletcher growing out of the estate of Conrad Braker, Jr., as an interest in a distributive share of an estate.

But the testamentary trust fund held by the defendant, Austin B. Fletcher, is not the distributive share of an estate of a decedent. True, it is a part of the estate of the testator, Braker. He founded the trust fund, but long before the execution of the assignments the fund was severed from the testator's estate by the act of his executors paying it into the hands of the trustee for the benefit of the

cestui que trust named in the will, and, eventually it was paid into Mr. Fletcher's hands, as trustee, under order of the court (par. 4, 5, 6 of bill). Unquestionably the *cestui que trust* could dispose of his equitable interest in the principal of the trust fund while it was being administered, and with the same positiveness it may be asserted that the purchaser of such an interest could enforce its payment to him by the trustee when the day arrived for its payment. But such an interest by a *cestui que trust* in a trust fund is quite a different one from that of an heir-at-law or next of kin in the undistributed estate of his ancestor. The interest of a *cestui que trust* in a testamentary trust fund is positive and fixed, but that of an heir or next of kin in an estate in the hands of an administrator or executor may be very vague and uncertain, subject to the discovery and payments of claims of creditors and the expenses of administration, and in this view it might be a doubtful matter whether the rights of an heir or next of kin is a chose in action.

In our case the estate of Conrad Braker, Jr., has been long since distributed; the executors of the estate have paid into the hands of the testamentary trustee the entire trust fund established by the will of the decedent, and no person other than the *cestui que trust* or his assignees have, so far as relates to the fund, any concern in its management and distribution. It is an interest capable of being assigned, and the assignees now, by their bill of complaint, ask that the Court will decree the payment over to them by the trustees of the assignee's part of the fund.

The assignment is of a *chase in action*, and the citizenship of the assignor precludes the lower court from taking cognizance of the suit.

POINT V.

The decretal order of the District Court of the United States for the Southern District of New York should be affirmed, with costs to the respective appellees, without prejudice to the right of the plaintiffs to bring any suit they may be advised in the proper court.

WILLIAM P. S. MELVIN,
Counsel for Appellee,
Austin B. Fletcher, Trustee, etc.

SAFFORD A. CRUMMEY,
Counsel for Appellee,
Conrad Morris Braker.

FILED

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JAMES D. MAHER

CLERK

No. ~~100~~ 454

October Term, 1913.

Supreme Court of the United States

JOHN A. S. BROWN and FRANK E. SCHER-MERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased,

Appellants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and CONRAD MORRIS BRAKER,

Appellee.

SUPPLEMENTAL BRIEF ON PART
OF AUSTIN B. FLETCHER, AS
TRUSTEE, &c.

WILLIAM P. S. MELVIN,
Solicitor for Defendant
Austin B. Fletcher, Appellee.

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Braker, Jr., deceased, and CON-
RAD MORRIS BRAKER,**

Appellees.

SUPPLEMENTAL BRIEF.

Counsel for appellee, Austin B. Fletcher, as trustee, etc., has no objection to this motion to advance the cause.